United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

For the District of Columbia Circuit

Nos. 18435, 18544

JAMES A. DOMBROWSKI and SOUTHERN CONFERENCE EDUCATIONAL FUND, INC.,

Appellants,

against

COLONEL THOMAS D. BURBANK, individually and as Commanding Officer of the Division of Louisiana State Police, RUSSELL R. WILLIE, individually and as Major of the Louisiana State Police Department, JAMES H. PFISTER, individually and as Chairman of the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature, SENATOR JAMES EASTLAND, individually and as Chairman of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate, J. G. SOURWINE, individually and as Committee counsel for the Internal Security Subcommittee of the Judiciary Committee of the United States Senate, the CITY OF NEW ORLEANS and ALLSTATE INSURANCE CO.,

Appellees.

Appeal From the United States District Court for the District of Columbia

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MICHAEL J. KUNSTLER,
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FILED JUL 23 1964

Nath. J. Paulson
CLERK

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JOINT APPENDIX

IN THE

United States District Court

For the District of Columbia

[SAME TITLE]

Complaint

The plaintiffs for their verified complaint allege:

PARTIES

1. James A. Dombrowski is a citizen of the State of Louisiana and of the United States.

2. Southern Conference Educational Fund, Inc. is a corporation organized under the laws of the State of Tennessee maintaining an office for business purposes in the State of Louisiana, whose purpose and function is to secure to Negro citizens the rights guaranteed them under the United States Constitution and to end all forms of segregation in the Southern section of the United States.

3. Defendant Thomas D. Burbank is the Commanding Officer of the Division of State Police for the State of Louisiana. He is sued individually and in his capacity as Commanding Officer of the Louisiana State Police. He is a citizen of the State of Louisiana.

4. Defendant Russell R. Willie is a Major in the Louisiana State Police Department. He is sued individually and in his capacity as Major of Louisiana State Police. He is a citizen of the State of Louisiana.

5. James H. Pfister is a Louisiana State representative and Chairman of the Joint Legislative Committee on

Un-American Activities of the Louisiana Legislature. He is sued individually and in his capacity as Chairman of said Committee. He is a citizen of the State of Louisiana.

6. Senator James Eastland, United States Senator from the State of Mississippi, is Chairman of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate. He is sued individually and in his capacity as Chairman of said Committee. He is a citizen of the State of Mississippi, and a resident of the District of Columbia.

7. J. G. Sourwine is Committee counsel for the Internal Security Sub-Committee of the Judiciary Committee of the United States Senate. He is sued individually and in his capacity as Committee counsel. He is a resident of the District of Columbia.

8. The City of New Orleans is a Municipal Corporation in the State of Louisiana.

9. Allstate Insurance Company is an insurance corporation organized under the laws of a state other than the State of Louisiana, but doing business in the State of Louisiana, and the District of Columbia.

JURISDICTON OF THE COURT

10. The jurisdiction of the Court over this Complaint arises under Title 28 U. S. C. 1331(a), 1343(3), (4), 2201, 2202, and 2281; Title 42 U. S. C. 1981, 1983, 1985, and under the Constitution of the United States, and in particular the First, Fourth, Fifth and Fourteenth Amendments thereto.

11. The amount in controversy, exclusive of interest and costs exceeds the sum or value of $10,000.00.

THE CAUSE OF ACTION

12. The defendants, Colonel Thomas D. Burbank, Major Russell R. Willie, James H. Pfister, James Eastland and J. G. Sourwine, and the City of New Orleans, through certain below mentioned persons employed by the City of New Orleans as police officers, acting in their official capacities in behalf of the City of New Orleans, entered into a plan, agreement and conspiracy wilfully and with intent with other persons to the plaintiffs now unknown under the color of state law and statutes, to deprive the plaintiffs of the rights, privileges and immunities granted to them as citizens of the United States by the laws and Constitution of the United States, and in particular, the First, Fourth and Fourteenth Amendments thereof.

13. Pursuant to this conspiracy on October 4, 1963, certain police officers of the Police Department of defendant, the City of New Orleans, namely, Major P. J. Trosclair, Captain Henry M. Morris, Sgt. Horace J. Austin, Jr., Sgt. John A. Sarran, Patrolman Kenneth Knapp, Patrolman Bernard Windstein and Patrolman Clinton Lauman, together with certain officers of the Louisiana State Police, Lt. William R. Abadie, Sgt. John F. Short, Patrolman Frank Lee and Eugene Gary, all acting under the direction of the Commanding Officer of the Louisiana State Police Department, and F. B. Alexander, Jr., Staff Director of the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature, acting under the direction of and in behalf of defendant, James H. Pfister, forcibly entered the business office of the Southern Conference Educational Fund, Inc. at 822 Perdido Street in the City of New Orleans, and proceeded to search and seize a large quantity of objects and articles belonging to said plaintiff, including all of the books and records of the said corporation, as well as all ledgers, receipts, memoranda, vouchers

and other documents, including pamphlets and literature, and many items of personal property belonging to James A. Dombrowski; that after searching the said place of business for several hours, and ransacking the office and seizing all articles, items and documents available, James A. Dombrowski was placed under arrest and booked with violation of certain state statutes, particularly Louisiana Revised Statutes 14:358 et seq. and 14:390 et seq.

14. Furthermore, officers of the New Orleans Police Department and of the State Police Department, acting pursuant to the said conspiracy and in behalf of and at the direction of the defendants herein named as members of the said conspiracy, proceeded to search the residence of James A. Dombrowski, at 715 Governor Nichols Street in the City of New Orleans, and seized many items of personal property from the said residence, and from the vehicle of James A. Dombrowski located nearby.

15. All of the items, articles and documents seized pursuant to all of the above mentioned searches, were forwarded to the office of the Louisiana State Police Headquarters in Baton Rouge, Louisiana, where they were under the custody of the defendant, Thomas D. Burbank, as Commanding Officer of the Division of State Police, and of defendant James H. Pfister in his capacity as Chairman of the above mentioned State Legislative Committee.

16. As a part of the aforementioned plan and conspiracy the defendants obtained certain arrest warrants and search warrants which purported to authorize the above set forth arrests and searches. These warrants were issued on October 2nd, 1962 by Judge Thomas Brahney, Jr., of the Section "D" of the Criminal District Court for the Parish of Orleans. It was part of the plan and conspiracy to obtain these warrants without any legal and lawful cause.

Pursuant to this plan and conspiracy they were issued without any legal cause and justification so that the defendants might seize the books, records, documents and other articles belonging to the plaintiffs. In further pursuance of the conspiracy defendant Willie, acting under color of his position as Major of the Louisiana State Police, made various allegations in the affidavits upon which the said warrants were issued, which allegations were false and untrue, and wholly without any probable cause.

17. In pursuance of the conspiracy the arresting officers seized at 822 Perdido Street lists of members, contributors and friends of plaintiff corporation, Southern Conference Educational Fund, Inc. The seizure of said lists was for the purpose of learning the identity of said members, contributors and friends, for the purpose of harassment and intimidation and to deter these people, the plaintiff and the plaintiff corporation from exercising their constitutional rights.

18. No affidavit or other criminal proceedings were ever initiated against plaintiff Dombrowski, but on October 25, 1963, upon motion of plaintiff for a preliminary hearing Judge J. Bernard Cocke, of Section "E" of the Criminal District Court for the Parish of Orleans, after hearing evidence, immediately and summarily discharged the plaintiff and held that there had been no probable cause shown for the issuance of the warrants of arrest. He therefore discharged the plaintiff. Accordingly the arrest of the plaintiff was illegal, null and void in violation of the Fourth Amendment and Fourteenth Amendment to the Constitution of the United States and the searches and seizures of plaintiffs' property were likewise illegal and unsupported by valid warrants issued upon probable cause, in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States of America.

19. In pursuance of the conspiracy within twenty-four hours of the said seizure of the various documents, objects and articles, as above set forth, the defendants Eastland and Sourwine caused a subpoena duces tecum purporting to be under the authority of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate, to be directed to defendants James H. Pfister and Thomas D. Burbank, ordering and directing the said defendants to produce all of the said documents, objects and articles at the office of the said Subcommittee of the United States Senate in Washington, D. C. on October 29, 1963.

20. Plaintiffs allege on information and belief that the issuance of the said subpoena, purporting to require production of the illegally seized documents before defendant Eastland and his Committee is part of the above described conspiracy, and is in furtherance of the object of the conspiracy to deprive plaintiffs of their constitutional rights; that the purpose of the conspiracy, among others, was to avoid the decisions of the United States Supreme Court prohibiting the enforced production of membership lists of organizations seeking enforcement of minority rights and guarantees of the equal protection clause of the United States Constitution; that the entire operation consisting of search, seizure and arrest of the plaintiff, and issuance of the subpoena as above set forth, was for the purpose of obtaining the books, records and membership lists of plaintiffs, in violation of the laws, statutes and Constitution of the United States.

21. The use of any of the documents, objects or articles so seized in any manner, by any person acting under color of state or federal authority would violate the constitutional rights of plaintiffs and in particular the rights guaranteed by the Fourth and Fourteenth Amendments of the United States Constitution in that the said documents, ob-

jects or articles are the fruit of an illegal search and seizure perpetrated for the purpose of securing membership lists and other documents and information in defiance of the United States Constitution.

22. In further pursuance of this conspiracy defendants Burbank, Willie and Pfister, at the request of defendants Eastland and Sourwine secretly and surreptitiously, without warrant or authority of law, transferred a portion of said books, records, documents and other articles belonging to the plaintiffs out of the jurisdiction of the United States District Court for the Eastern District of Louisiana. Plaintiffs had instituted in that Court a proceeding under appropriate federal statutes to obtain the return of said documents and articles, and to receive appropriate redress under the law for the illegal acts of the defendant conspirators. In order to evade the jurisdiction of that Court, the defendants caused to be transferred a portion of the said documents, records and other articles to the District of Columbia. Upon information and belief said documents, articles and records are presently in the possession of defendants Eastland and Sourwine in the District of Columbia. Other documents and records, all belonging to the plaintiffs, illegally and in violation of the Constitution of the United States seized from them, were also secretly and surreptitiously transferred to a State Court House in the State of Mississippi, and are presently in the possession of defendant Eastland.

23. That the arrest of plaintiff James A. Dombrowski, and the search of his office, residence and automobile, all without lawful authority, caused to said plaintiff intense mental and emotional pain and suffering, embarrassment and humiliation, as did the attendant and resultant publicity caused thereby.

24. Defendant, Allstate Insurance Company, has issued to the City of New Orleans a policy of liability in-

surance purporting to insure the said municipal corporation against legal liability resulting from delict on the part of any of its agents, servants, employees, including the police officers named herein, as well as others acting in behalf of defendant municipal corporation in the transactions above described; that the said policy of insurance was in full force and effect on October 4, 1963, and at all times pertinent herein.

25. Plaintiff Dombrowski seeks damages herein for the false arrest, the search of his office, home and automobile and the seizure of his personal and business papers and documents and other objects and articles, and for the humiliation and embarrassment and mental and emotional pain and suffering caused thereby in the full sum of $250,000.00 against defendants Burbank, Pfister, Willie, Eastland, Sourwine, the City of New Orleans and Allstate Insurance Company, jointly and in solido.

26. Plaintiff Southern Conference Educational Fund, Inc., seeks damages herein for the illegal search of its office and the illegal seizure of books, records, documents and other articles belonging to it in the full sum of $250,000.00 against defendants Burbank, Pfister, Willie, Eastland, Sourwine, the City of New Orleans and Allstate Insurance Company, jointly and in solido.

27. The various documents, books, records, files, articles and objects seized from the plaintiffs are vital in the operation of their business affairs. Plaintiffs will suffer irreparable injury unless the said documents, articles and objects are returned forthwith.

The defendants are threatening to and continue to threaten to utilize the said documents, papers, lists, and other articles all of which were illegally seized from the

plaintiffs, for the purpose of harassing the plaintiffs and the members of the plaintiff corporation in their exercise of their rights under the First and Fourteenth Amendments to the Constitution of the United States. In particular the defendants threaten and continue to threaten to utilize this illegally seized material to intimidate and deter the plaintiffs and the members of the plaintiff corporation from utilizing rights guaranteed to them under the Constitution of the United States in their efforts to secure the implementation of the guarantees of the equal protection clause of the Fourteenth Amendment.

Unless this Court grants the relief prayed for the plaintiffs and the members of the plaintiff corporation will suffer immediate and irreparable injury in that the defendants will seek to utilize this seized material in attempts to deter, frighten and intimidate them from exercising rights guaranteed by the First and Fourteenth Amendments.

Unless this Court grants the relief prayed for the members of the plaintiff corporation, its friends, supporters and contributors will be subject to continual harassment, intimidation and deterrence of the exercise of their constitutional rights under the First and Fourteenth Amendments to the Constitution of the United States.

28. Plaintiffs have no adequate remedy at law with respect to their rights in the illegally seized property.

29. There has been no previous application for this relief.

WHEREFORE, plaintiffs pray for the following relief:

(1) That a permanent injunction issue, restraining the defendants, their agents and all persons acting in concert with them from using in any manner whatsoever any of

the various documents, books, records or other objects seized by them or by any of them on or about October 4th, 1963, or from using in any manner whatsoever any photographs, photocopies, or any other copies which may have been made by them at any time following the seizure of the said objects, and ordering the defendants and each of them to return to the plaintiffs any copies, photocopies, or copies by any other process of the said documents, books, records, articles and objects which they may have procured, and ordering the defendants to return to the plaintiffs all of the documents, books, records, or other objects which were seized from the plaintiffs on or about October 4th, 1963.

(2) That judgment be entered in favor of plaintiff Dombrowski against the defendants jointly and in solido in the sum of $250,000.00 together with legal interest thereon and for all costs of these proceedings, and

(3) That judgment be entered in favor of plaintiff Southern Conference Educational Fund, Inc., against the defendants jointly and in solido in the sum of $250,000.00 together with legal interest thereon and for all costs of these proceedings, and

(4) That an interlocutory injunction and order be issued restraining the defendants, their agents, their attorneys and all others acting in concert with them, pending the hearing and determination of the prayer for permanent relief from

(a) using in any manner whatsoever any of the various documents, books, records or other objects seized by them or by any of them on or about October 4th, 1963, or from using in any manner whatsoever any photographs, photocopies, or any other copies which may have been made by them at any time following the seizure of the said objects, and

ordering the defendants and each of them to return to the plaintiffs any copies, photocopies, or copies by any other process of the said documents, books, records, articles and objects which they may have procured, and

(b) that an order be entered directing that the defendants forthwith produce and deposit with the Clerk of this Court all of the various documents, books, records or other objects seized by them from the plaintiffs on or about October 4th, 1963 and that these documents, books, records or other objects be held in the custody of the Clerk of this Court until the hearing and determination of the prayer for permanent relief,

And for such other relief as may to this Court be deemed just and proper—

Plaintiffs respectfully pray that the above relief be granted.

Plaintiffs by their Attorneys

KUNSTLER KUNSTLER & KINOY
511 Fifth Avenue
New York 17, N. Y.
By ARTHUR KINOY
MICHAEL J. KUNSTLER
WILLIAM M. KUNSTLER

MILTON E. BRENER
1304 National Bank of Commerce Bldg.
New Orleans 13, Louisiana

WILLIAM M. KUNSTLER
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Washington, D. C.

DILLON AND DILLON
1625 I St. N. W.
Washington, D. C.

Opinion of the Court

The Court: This is an action against Senator Eastland, the Chairman of the Senate Judiciary Committee, J. G. Sourwine, the counsel of one of the subcommittees of that Committee, and numerous other defendants. Only Senator Eastland and Mr. Sourwine have been served with process. The other defendants have not been served and have not appeared and consequently they are not before the Court.

The action has two aspects insofar as the two defendants who have appeared are concerned. First, it seeks an injunction against the reproduction and use of certain documents that have come into the possession of the Senate Judiciary Committee. Second, it seeks money damages. Although in form only one count is set forth, actually there are two claims for relief or two causes of action, which for the sake of clarity should be set forth as two separate counts.

The plaintiff has moved for a preliminary injunction against the two defendants who have appeared and now seeks to withdraw that motion, stating, however, that it desires to renew it if it can secure additional evidence which it proposed to do, in part at least, by taking the deposition of one of the defendants.

Counsel for the two defendants contend that the cause of action for an injunction does not set forth a valid claim for relief and that under no set of circumstances that could be proven thereunder could the plaintiff prevail and counsel for the two defendants accordingly ask the Court to dismiss that cause of action as to them at this time.

This procedure has been approved by the Supreme Court in Mast Foos & Company v. Stover Manufacturing Company, 177 U. S. 485, 495.

This case involves the basic principle of constitutional law of separation of power. Sometimes we tend, amidst dealing with numerous details, to forget the basic principles of law and it is useful occasionally to refresh ourselves at the fountain of the basic principles.

It is elementary that our Federal Government is divided into three coordinate branches. No one of the three may interfere with the activities of either of the other two except in the limited matters as provided by other provisions of the Constitution. Consequently, this Court may not enjoin a Congressional committee from pursuing its activities.

If any authority is needed to support this elementary principle the Court may refer to Hearst v. Black, 66 App. D. C. 313, in which in an opinion written by Judge Groner the Court of Appeals for this jurisdiction held that a Senate committee could not be enjoined from making use of certain telegrams which had come into its possession and which it was claimed by the plaintiff had been seized illegally.

In Methodist Federation For Social Action v. Eastland, 141 F. Supp. 729, a Three-Judge Court in this District, in an opinion written by Circuit Judge Edgerton, held that the courts could not enjoin a subcommittee of the Senate Committee on the Judiciary from printing and circulating a pamphlet. In this case Judge Edgarton made this significant statement:

> "We have no more authority to prevent Congress or a committee or public officer acting at the express direction of Congress from publishing a document than to prevent them from publishing the Congressional Record. If it unfortunately happens that a document which Congress has ordered published contains statements that are erroneous and defamatory and are made without allowing the persons affected an opportunity to be heard, this adds nothing to our authority. Only Congress can deal with such a problem. The Constitutional history called to our attention includes no instance in which an English court has attempted to restrain Parliament or an American court to restrain Congress from publishing any statement. This history therefore tends to confirm our view."

Order, December 18, 1963

In the light of this discussion the Court will dismiss as to defendants Senator Eastland and Mr. Sourwine the alleged claim for an injunction.

You may submit an order accordingly.

Order, December 18, 1963

This cause having come on for hearing upon plaintiffs' motion for a preliminary injunction to enjoin defendants Senator James O. Eastland, Chairman of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate, and J. G. Sourwine, Counsel for the Subcommittee, from making use of certain documents and records, or copies thereof, presently in the custody and possession of the Subcommittee, and upon consideration of the motion, the opposition thereto, the complaint filed herein and argument of counsel in open court, and it appearing to the court that plaintiff's claims for injunctive relief as set forth in their motion for preliminary injunction and complaint are invalid on their face in that the granting of such relief by this court would contravene the constitutional requirement of separation of powers and would exceed the jurisdiction of this court, it is by the court this 18th day of December, 1963

ORDERED AND DECREED that plaintiffs' motion for preliminary injunction be and the same hereby is denied; and it is

FURTHER ORDERED AND DECREED that so much of plaintiffs' complaint which seeks permanent injunctive relief against these defendants be and the same hereby is dismissed.

The oral opinion delivered by the Court shall constitute the findings of fact and conclusions of law herein.

Motion to Dismiss or in The Alternative for Summary Judgment

Come now the defendants James O. Eastland, United States Senator from Mississippi and Chairman of the Committee on the Judiciary of the United States Senate and of the Subcommittee on Internal Security of that Committee, and J. G. Sourwine, Chief Counsel, Internal Security Subcommittee of the Committee on the Judiciary of the United States Senate by their counsel and move the Court to dismiss the complaint as to them for failure to state a claim upon which relief can be granted.

Alternatively, the defendants move for summary judgment for the reason that the affidavits filed herewith and made part hereof, and the deposition of J. G. Sourwine on file in this cause, show there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law.

Defendants incorporate herein and as part hereof their affidavits earlier filed with the Court as part of their opposition to plaintiffs' motion for a preliminary injunction, photocopies of which are attached for the convenience of the Court.

Also incorporated herein and made part hereof are the following affidavits which will be identified as Exhibits:

1. Affidavit of James H. Pfister, Chairman of the Joint Legislative Committee on Un-American Activities for the State of Louisiana, executed on January 4, 1964, and House Concurrent Resolution No. 13, Regular Session, 1960, marked as Exhibit A to the affidavit ..... Exhibit 1

Motion to Dismiss or in the Alternative for Summary Judgment

2. Affidavit of Jack N. Rogers, member of the bar of the State of Louisiana, and of the Supreme Court of the United States, and Counsel for the Joint Legislative Committee on Un-American Activities of the State of Louisiana, executed on January 25, 1964 ..... Exhibit 2

3. Affidavit of Thomas D. Burbank, Director of Public Safety and Superintendent of State Police of the State of Louisiana, executed on January 3, 1964 ..... Exhibit 3

4. Affidavit of Major Russell R. Willie, Supervisor of Bureau of Identification, State Police of the State of Louisiana, executed on January 3, 1964 ..... Exhibit 4

5. Affidavit of Mrs. Laura Nicholson, Employee and Secretary, Joint Legislative Committee on Un-American Activities of the State of Louisiana, executed on January 3, 1964 ..... Exhibit 5

6. Affidavit of Senator James O. Eastland, executed on December 4, 1963 will be referred to as ..... Exhibit 6

7. The affidavit of J. G. Sourwine, executed on December 4, 1963 will be referred to as ..... Exhibit 7

/s/ David C. Acheson,
DAVID C. ACHESON,
United States Attorney.

/s/ Joseph M. Hannon,
JOSEPH M. HANNON,
Assistant United States Attorney.

of Counsel:

/s/ Roger Robb
ROGER ROBB

Order Granting Motion for Summary Judgment

This cause having come on for hearing upon the motion of the defendants James O. Eastland and J. G. Sourwine to dismiss, or in the alternative for summary judgment, and upon consideration of said motions, the memoranda of points and authorities, the exhibits and affidavits in support thereof and in opposition thereto, and upon consideration of oral arguments of counsel for the parties made in open court, and it appearing to the court that there exists no genuine issue of material fact and that said defendants are entitled to judgment as a matter of law, it is by the Court this day of March 1964,

ORDERED that summary judgment be and the same hereby is granted for the defendants, Eastland and Sourwine, and it is

FURTHER ORDERED that the action be and the same hereby is dismissed.

Notice of Appeal

Notice is hereby given that James A. Dombrowski, and Southern Conference Educational Fund, Inc. plaintiffs above named, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the order granting summary judgment for defendants entered in this action on the day of March, 1964.

WALTER E. DILLON, JR.,
Attorney for Appellants,
1625 Eye Street, N.W.

Affidavit of James A. Dombrowski, in Support of Motion for Temporary Injunction

STATE OF LOUISIANA }
PARISH OF ORLEANS } SS.:

BEFORE ME, the undersigned authority, duly commissioned and qualified in and for the Parish and State first above written,

PERSONALLY CAME AND APPEARED: JAMES A. DOMBROWSKI, who, after being first duly sworn, deposed and said:

That on October 4, 1963, officers of the New Orleans Police Department and the Louisiana State Police Department forcibly entered the office of the Southern Conference Educational Fund, Inc. at 822 Perdido Street in this City and the residence of appear [sic] at 715 Governor Nichols Street in New Orleans, and his automobile located nearby, and that the said officers seized in the course of each of these searches, quantities of books, records, files, documents, articles and objects and retained them in their, the police, custody; that many of these documents, books, records, files, documents, articles and objects are vital to the normal every day operation of the business of the Southern Conference Educational Fund, Inc., of which appearer, James A. Dombrowski, is Managing Director, and that the return of these various documents, books, and records, etc. is vital therefor; that appearer will suffer irreparable injury unless the defendants in these proceedings are enjoined and restrained immediately from disposing of the said documents, etc., or surrendering their possession to other persons, and unless the said documents, etc., are returned forthwith.

JAMES A. DOMBROWSKI.

Affidavit of Milton E. Brener, in Support of Motion for Temporary Injunction

STATE OF LOUISIANA }
PARISH OF ORLEANS } SS.:

BEFORE ME, the undersigned authority, duly commissioned and qualified in and for the Parish and State first above written,

PERSONALLY CAME AND APPEARED: MILTON E. BRENER, who, after being first duly sworn, deposed and said:

That he is one of the attorneys herein; that following the arrest and booking of James A. Dombrowski, Benjamin E. Smith and Bruce Waltzer on October 4, 1963, with violation of the Louisiana Revised Statute 14:358 et seq. and 14:390 et seq. no criminal charges were lodged in the Criminal District Court for the Parish of Orleans which has jurisdiction over the alleged offenses; that no affidavit was filed by any arresting officers or any other persons, nor was there any bill of information filed or indictment returned; that on motion of petitioners a preliminary hearing was held before the Honorable J. Bernard Cocke, Judge of Section "E" of the said Criminal District Court, for the purpose of determining whether the State had probable cause for the arrest of these petitioners, and to further determine whether said petitioners should be bound over for trial or whether they should be discharged; that after hearing evidence adduced by the State the Court summarily and immediately ordered the said Dombrowski, Smith and Waltzer discharged holding that no probable cause existed as a legal basis for the arrest of any of the said three petitioners.

MILTON E. BRENER.

Affidavit of James A. Dombrowski, in Support of Motion for Temporary Injunction

STATE OF LOUISIANA }
PARISH OF ORLEANS } SS.:

BEFORE ME, the undersigned authority, duly commissioned and qualified in and for the Parish and State first above written,

PERSONALLY CAME AND APPEARED: JAMES A. DOMBROWSKI, who, after being first duly sworn, deposed and said:

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JAMES A. DOMBROWSKI.

Affidavit of Milton E. Brener, in Support of Motion for Temporary Injunction

STATE OF LOUISIANA }
PARISH OF ORLEANS } SS.:

BEFORE ME, the undersigned authority, duly commissioned and qualified in and for the Parish and State first above written,

PERSONALLY CAME AND APPEARED: MILTON E. BRENER, who, after being first duly sworn, deposed and said:

That he is one of the attorneys herein; that following the arrest and booking of James A. Dombrowski, Benjamin E. Smith and Bruce Waltzer on October 4, 1963, with violation of the Louisiana Revised Statute 14:358 et seq. and 14:390 et seq. no criminal charges were lodged in the Criminal District Court for the Parish of Orleans which has jurisdiction over the alleged offenses; that no affidavit was filed by any arresting officers or any other persons, nor was there any bill of information filed or indictment returned; that on motion of petitioners a preliminary hearing was held before the Honorable J. Bernard Cocke, Judge of Section "E" of the said Criminal District Court, for the purpose of determining whether the State had probable cause for the arrest of these petitioners, and to further determine whether said petitioners should be bound over for trial or whether they should be discharged; that after hearing evidence adduced by the State the Court summarily and immediately ordered the said Dombrowski, Smith and Waltzer discharged holding that no probable cause existed as a legal basis for the arrest of any of the said three petitioners.

MILTON E. BRENER.

Affidavit of James A. Dombrowski, in Opposition to Motion for Summary Judgment

STATE OF LOUISIANA }
PARISH OF ORLEANS } SS.:

BEFORE ME, the undersigned authority, duly qualified and commissioned in and for the Parish and State first above written,

PERSONALLY CAME AND APPEARED: DR. JAMES A. DOMBROWSKI who, after being first duly sworn, declared as follows:

I am a graduate of Union Theological Seminary in New York City where I have served in the past as Instructor. I am also a Doctor of Philosophy in philosophy. I have served as the Executive Director of Southern Conference Educational Fund Inc. since its inception in 1946. The sole purpose of this organization is the elimination of segregation and all forms of discrimination based on race in the South through education and other non-violent methods. My sole interest in political action is likewise in the field of Civil Rights, and my aims and purposes in that regard are identical to the expressed aims and purposes of the Southern Conference Educational Fund. SCEF is not, and has never been a communist or subversive organization. I am not and have never been a communist or a subversive. My own activity and the activity of SCEF is lawful and neither I, nor this organization are, or have been engaged in any unlawful or illegal activity, nor have I or SCEF violated any of the provisions of R. S. 14:358 et seq. or 14:390 et seq.

The activities of myself and SCEF are not secret, nor is there anything secretive about the operation of SCEF, or my own functions therein. On the contrary, it is our purpose to obtain as wide an audience to our advocacy in behalf of Civil Rights as is possible. SCEF publishes

considerable quantities of literature in the field of Civil Rights, all of which is available to the public, including all defendants in this case. In addition, SCEF publishes a monthly newspaper entitled "The Southern Patriot" for the purpose of advancing the cause of SCEF. One or more of the defendants, or others acting in their behalf, subscribe to "The Southern Patriot", and the defendants have thus had access to all material published in this newspaper for a considerable period of time. Nothing subversive or communist in nature has ever been published by SCEF either in "The Southern Patriot" or in any of the other literature.

On October 4, 1963, at about 3:00 P. M. a large moving van was driven up to the entrance of the office of SCEF at 822 Perdido Street accompanied by five officers of the Louisiana State Police, assisted by approximately seven New Orleans Police Officers and Col. F. B. Alexander, Jr., the Staff Director of the Joint Legislative Committee. In addition, there were about twenty trustees from the House of Detention in green fatigue uniforms. These trustees were lined up in the hallway of the building at 822 Perdido Street. The officers forcibly entered the offices and proceeded to break open one of the doors near by with sledge hammers and pick-ax. This was done under the mistaken impression that it was the door to the office of the SCEF. The raid continued for approximately four hours, during which time the office was completely ransacked and almost literally cleaned out. One of the officers took my crutches, dismantled them and inspected the insides. The block was soon filled with many curious onlookers, photographers and reporters. I was placed under arrest and confined in the District Station. Some of the officers involved proceeded to my home where only my wife was present and likewise ransacked my home at 715 Governor Nichols Street. They likewise searched my automobile located nearby.

Affidavit of James A. Dombrowski

I have read the applications for search warrants of the office, my home and car and for my arrest warrant, as well as the warrants themselves, as well as the affidavits filed in this case.

The statement in the application for the search of 822 Perdido Street that "The Southern Conference Educational Fund is a 'subversive organization' as defined in R. S. 14:358 et seq. and is being knowingly operated as such by James Dombrowski in violation of said statute," is an untrue allegation. SCEF is not subversive and is not being operated as such by me or anyone else, nor has it ever been cited as such by any official body. To my knowledge no communist has frequented these premises or done business with me on the premises or anywhere else. There was no communist political propaganda on the premises nor has there ever been. The statement in the applications as well as in the affidavits filed in this case that I have been identified twice in sworn testimony as a communist fails to include the significant facts that these alleged identifications were made in 1954, and by witnesses not subject to cross-examination, both of whom were completely discredited and proven to have committed perjury. The "sworn testimony" was immediately challenged by me under oath as an untruth in the presence of the two individuals who made the charges. No charges of perjury were brought either against me or my accusers.

The statements in the affidavits filed in this case that SCEF has been cited as a communist front organization is likewise not correct. Despite the testimony of the two individuals, one of whom accused me of being a communist, and the other who accused me of "seeming" to be a communist, the Eastland Committee in its report in 1955 did not cite SCEF as a subversive organization or as a communist front organization. Whatever the committee may have found to be the case, the report did not cite SCEF as subversive or as a communist front.

The application for the search of my vehicle, likewise signed by Willie, states falsely that SCEF is a subversive organization. It also contains the allegation that I am an "identified communist" which is untrue by virtue of the misrepresentations and omissions above mentioned.

The same misrepresentations and omissions are set forth in the application for the search of my home and in the application of my arrest warrant. The latter untruthfully states that I entered into a conspiracy to violate 14:358 et seq. and that I was guilty of distributing and storing communist propaganda.

I note that all of the warrants, that for the search of my office, my home and my automobile, authorized the seizure of "books, records, and files of the Southern Conference Educational Fund, Inc. and James A. Dombrowski, plus any communist political propaganda and communist party records." Tremendous quantities of materials were seized which were not described even by the terms of the warrants. Included among such materials were approximately $100 in postage stamps, approximately 1500 to 2000 books and pamphlets including many from my personal library on literature, philosophy, religion and sociology, the pictures from the office wall including a photograph inscribed by Mrs. Eleanor Roosevelt, and the complete inventory of thousands of pamphlets, brochures and other literature concerning integration, and several thousand blank receipt forms and blank stationery and letterheads. A more complete description of part of the property seized is as follows:

1. A four-drawer iron file, letter-size, containing all of the corporation correspondence relating to finance, Board of Directors (about 100 individual file folders of board members);

2. A four-drawer iron file similar to the one listed above containing correspondence with indi-

viduals, staff members, organizations; material on special projects sponsored by the Fund.

3. A four-drawer wooden file, letter-size, containing a file of clippings on integration, some corporation correspondence on current projects; personal papers of James A. Dombrowski including a folder with certain corporate certificates.

4. Several transfer files containing corporate records and correspondence. Number of files not certain, perhaps four to six.

5. Wooden library index file containing about 16 to 20 thousand 3x5 cards.

6. Library of about 1500 to 2000 (est.) books and pamphlets, primarily on integration but including many books from my personal library on literature, philosophy, religion, sociology, etc.

7. Contents of my desk as well as the contents of two additional desks and everything on a large work table. From my desk, my personal check book containing some checks drawn to my name, all of my personal bank statements and other personal property.

8. Financial records of the corporation including cash book, ledger, journal, auditors' reports, cancelled checks and bank statements.

9. A file of "The Southern Patriot" for 21 years.

10. Photographs illustrating the southern integration movement over a period of about 20 years, largely from "The Southern Patriot" file.

11. Pictures from my office wall, including a photograph inscribed to me by Mrs. Eleanor Roose-

velt, a letter from Franklin D. Roosevelt to Dr. Frank Graham, president of the Southern Conference for Human Welfare; a letter to me from Albert Einstein; a photograph inscribed to me from Mrs. Mary McLeod Bethune; photograph inscribed of Aubrey W. Williams and friend; a framed award to "The Southern Patriot" by the School of Journalism of Lincoln University;

12. Three posters from my office wall: one a full page ad from an Atlanta paper by the Committee on Appeal for Human Rights; a poster in color WE SHALL OVERCOME from the March on Washington for Jobs & Freedom; and a full page ad from the "New York Times" entitled "Love, the Greatest thing in the World."

13. Contents of a storeroom including records, several thousand sheets of blank stationery, letterheads, bond paper, etc., probably five to ten thousand blank receipts, numbered and printed in duplicate and triplicate, also various forms; probably 5M to 10M pamphlets, brochures, etc.

14. Mailing list of "The Southern Patriot" about 10,000 names.

The entire mass of articles seized constituted about 75 or 76 large cartons of evidence and completely filled the huge truck which was used to transport the seized material. None of the seized material consisted of communist or subversive propaganda, nor did any of it contain any evidence of communism or subversion. I have been informed that 27 cartons of evidence have been returned and are being held in the District Attorney's Office and that I am entitled to pick up these cartons. On the advice of my attorney, I am refusing to do so at this time.

JAMES A. DOMBROWSKI.

Affidavit of Benjamin E. Smith, in Opposition to Motion for Summary Judgment

STATE OF LOUISIANA }
PARISH OF ORLEANS } SS.:

BEFORE ME, the undersigned authority, duly qualified and commissioned in and for the Parish and State first above written,

PERSONALLY CAME AND APPEARED: BENJAMIN E. SMITH, who, after being first duly sworn, declared as follows:

I am a practicing attorney-at-law in the City of New Orleans, and a member of The Southern Conference Educational Fund, Inc. I am presently serving as Treasurer of that organization. The sole purpose of this organization is the elimination of segregation and all forms of discrimination based on race in the South through education and other non-violent methods. My sole interest in political action is likewise in the field of Civil Rights, and my aims and purposes in that regard are identical to the expressed aims and purposes of the Southern Conference Educational Fund. SCEF is not, and has never been a communist or subversive organization. I am not and have never been a communist or a subversive. My own activity and the activity of SCEF is lawful and neither I, nor this organization are, or have been engaged in any unlawful or illegal activity, nor have I or SCEF violated any of the provisions of R. S. 14:358 et seq. or 14:390 et seq.

The activities of myself and SCEF are not secret, nor is there anything secretive about the operation of SCEF, or my own functions therein. On the contrary, it is our purpose to obtain as wide an audience to our advocacy in behalf of Civil Rights as is possible. SCEF publishes considerable quantities of literature in the field of Civil Rights, all of which is available to the public, including all defendants in this case. In addition, SCEF publishes

a monthly newspaper entitled "The Southern Patriot" for the purpose of advancing the cause of SCEF. One or more of the defendants, or others acting in their behalf, subscribe to "The Southern Patriot" and the defendants have thus had access to all material published in this newspaper for a considerable period of time. Nothing subversive or communist in nature has ever been published by SCEF either in "The Southern Patriot" or in any of the other literature.

I represented Dr. Dombrowski when he appeared before the Internal Security Subcommittee during the course of its hearing in New Orleans, La., in March of 1954. Dr. Dombrowski answered all questions placed to him by the committee except those concerning the identity of contributors. He denied under oath that he was a communist or that he had ever been. In the presence of the two individuals who accused him of being either a communist or under communist control, Dr. Dombrowski accused these witnesses of testifying untruthfully. I was denied any right to cross-examine either of the accusing witnesses. Dr. Dombrowski has never been charged with having committed perjury during the course of his testimony. The report of the committee was published in 1955 and stated in pertinent part as follows:

> "The Southern Conference Educational Fund, Inc. was initially an adjunct of the Southern Conference for Human Welfare. After the exposure of the Southern Conference for Human Welfare as a Communist front, it began to wither and was finally dissolved, but the Southern Conference Educational Fund, Inc. continued. The official paper, the *Southern Patriot,* which was published by the Southern Conference for Human Welfare, was taken over by the Southern Conference Educational Fund, Inc., which professes the same ostensible purpose.

Affidavit of Benjamin E. Smith, in Opposition to Motion for Summary Judgment

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Affidavit of Benjamin E. Smith, in Opposition to Motion for Summary Judgment

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Affidavit of Benjamin E. Smith

> "Dr. James A. Dombrowski was identified as executive director of the Southern Conference Educational Fund, Inc., who, immediately prior to this assumption of his present office, had been administrator of the Southern Conference for Human Welfare. Dr. Dombrowski was identified by a witness as one who, to the witness' certain knowledge, had been a member of the Communist Party. He was also identified by another witness as one who had accepted Communist Party discipline."

On October 4, 1963, my law office and my home and automobile were raided and ransacked by a number of State Police Officers assisted by certain local policemen. I was arrested pursuant to a warrant of arrest and charged with violation of R. S. 14:358 and 14:390 et seq. Arrested at the same time was James Dombrowski. I have worked in close association for the past six years with Dr. Dombrowski and he has never, to my knowledge, advanced the cause of communism, nor is he a communist or a subversive. Nor was he acting in violation of any law of the State of Louisiana including 14:358 and 14:390 et seq. to my knowledge.

Dr. Dombrowski and I, along with Bruce Waltzer, my law partner, were paroled shortly after the arrest. No formal charges were ever lodged against us for violation of the statutes with which we were booked. However, on October 25, 1963, on motion of Dombrowski, Waltzer and myself, a preliminary hearing was held in Section "E" of the Criminal District Court for the Parish of Orleans to inquire into the validity of the arrest. Testimony was given by the defendant in this case, Russell Willie, and by Jack Rogers, attorney for the Joint Legislative Committee. At the conclusion of the hearing, the three of us were discharged on the grounds that the arrest warrants were improvidently issued and the arrests illegal.

Affidavit of Benjamin E. Smith

Because we had learned during the course of the hearing that the Internal Security Sub-Committee of the Judiciary Committee of the United States Senate was [sic] subpoenaed all of the documents seized from our respective homes and offices, and that the subpoenas were returnable on the 29th of October, we filed on October 27th a complaint in the Federal District Court seeking an injunction to prohibit the removal of the various articles and objects and documents from the State. Our request for a temporary restraining order to this effect was submitted to the Honorable Judge Robert Ainsworth on the morning of Sunday, October 27, 1963. We were subsequently advised through the Clerk of the Federal District Court on the afternoon of October 27, 1963, that Judge Ainsworth had spoken either with Col. Burbank, the defendant herein, or with his representative, and had been assured that all of the seized material was still at the State Police Headquarters in Baton Rouge. On instructions from Judge Ainsworth to notify the other parties to be present in his office at 9:00 A. M. on the morning of Monday, October 28, 1963, for the purpose of discussing the requests for a temporary restraining order, telegrams were sent to all defendants, including Burbank and Willie. We were subsequently advised that the defendants could not appear by 9:00 A. M. on the morning of Monday, the 28th, and that the conference was being rescheduled for 12:00 Noon on the same day. At the start of the conference at 12:00 Noon all persons present in the office of Judge Ainsworth were advised that all of the seized materials had been removed from the State and delivered to Woodville, Mississippi. A telegram was exhibited from J. G. Sourwine, the attorney for the Internal Security Sub-Committee which had been dated the 27th of October, 1963, at 11:43 P. M. This telegram allegedly required the removal of the documents to Woodville. We were furnished with copies of the Sourwine telegram, and a letter dated October 5, 1963,

addressed to Col. Burbank by Mr. Sourwine wherein Col. Burbank was alleged to have agreed to act as temporary custodian of all of the documents.

BENJAMIN E. SMITH.

Affidavit of Arthur Kinoy, Sworn to February 18, 1964, in Opposition to Motion for Summary Judgment

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ARTHUR KINOY, being duly sworn, deposes and says:

1. I am one of the counsel in the above-entitled action. I make this affidavit in support of plaintiffs' Points and Authorities and Answer to Defendants' Motion to Dismiss or in the Alternative for Summary Judgment.

2. I attach hereto as Exhibit "A" and make a part hereof, a clipping which appeared in the *New Orleans Times Picayune* on February 6, 1964. The information contained in this news item was brought to the attention of counsel for the plaintiffs on Friday, February 7, 1964. This information was received, accordingly, after the filing of defendant's motion to dismiss or in the alternative for summary judgment.

As stated in the Points and Authorities and Answer to Defendants' Motion, counsel for the plaintiffs proposes to pursue this matter through the normal and tested procedures of litigation. Counsel cannot here assert to the Court that the information contained in the news story is either accurate or complete. However, counsel suggests that any determination of the motion for summary judgment would require the exploration of this question through

the procedures of litigation either by affidavit or deposition. The information contained in the article, if true, relates materially to the assertion of fact of the defendants that their actions were in some way authorized by the Internal Security Subcommittee of the Senate. The information contained in the *Times Picayune* news story, if true, would further indicate to the Court the presence of a serious and sharply disputed material issue of fact which would require the denial of any motion for summary judgment.

Furthermore, under Rule 56, Subdivision (f) of the Federal Rules of Civil Procedure, upon the facts stated in this affidavit the Court may deem it appropriate to refuse the application for judgment, or "order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had". See Rule 56 (f), Federal Rules of Civil Procedure.

ARTHUR KINOY

Exhibit "A", Annexed to Foregoing Affidavit

COPYING OF SCEF RECORDS IS HIT

KEATING PROTEST SENATE UNITS MOVE

Sen. Kenneth B. Keating (R-N. Y.), a member of the Senate Internal Security Subcommittee, has protested the subcommittee's subpoena of records of the Southern Conference Educational Fund.

Records of the New Orleans based group were first seized last Oct. 4 at the request of the Louisiana Joint Legislative Committee on Un-American Activities.

* * *

Sen. Keating was absent Nov. 14 when the Senate subcommittee approved a resolution authorizing the copying

of SCEF records. Monday, he expressed "grave concern" and said no such action should be taken in the future without full discussion of the subcommittee.

His statement was made in a letter to subcommittee chairman James O. Eastland (D-Miss.).

He asked Sen. Eastland what legislative purpose the subpoena had. He said he opposed the federal subpoena of records in cases before state courts.

Excerpt from Sourwine Deposition

[41] Q. [Mr. Brener] How many subpoenas were actually served on that day by your Committee, I mean, by you? A. [Mr. Sourwine] I think five.

Q. Did you bring the forms with you? A. Yes, I took the subpoena forms with me.

Q. Blank? A. Signed by Senator Eastland in blank, subject to being filled in in accordance with his instructions and then I had them filled in down there. I caused them to be filled in down there.

Q. When did Senator Eastland sign them, do you know? A. No, I do not know when the Senator had signed them. I simply took them from the file when I left.

Q. In other words, he has, as a routine matter, [42] subpoenas signed in blank, is that correct, to which you have access? A. I do not know what he has.

Q. You have? A. There is locked up in the Committee offices a folder which contains a number of subpoenas signed by the Senator in blank. These are papers, of course, of no force and effect until they are filled in and served, and if filled in and served in accordance with the Senator's instructions, they become his subpoena, the subpoena of the Committee.

Q. Who actually filled in the subpoena? A. A young lady, whose name I do not recall, who is or was, at the time, secretary to Mr. Jack Rogers. I had asked where and how I might get clerical assistance. Mr. Rogers said he would call his secretary in.

Q. So this was the secretary to Jack Rogers? A. That is correct. He did call her in and placed her at my disposal, and she did several hours' work for me.

> Mr. Robb: This was a Saturday, was it?
>
> The Witness: Yes, it was. I think that is the day you cannot even get a shave or a haircut in New Orleans.

Excerpt from Sourwine Deposition

Mr. Robb: What was that date, for the record?
The Witness: This was the 5th of October.

By Mr. Brener:

Q. You are aware of the fact that the date of the [43] subpoenas is the 4th of October, are you not? A. I am aware that the date on the subpoenas is erroneous in that record; yes, sir.

Q. It was a typographical error? A. I assume it was a typographical error. Basically it was my error in failing to catch it before I left the subpoenas go out, before I served them. The young lady filled them in. I did not instruct her to date them the 4th. I assumed they were dated the 5th.

I was sufficiently careless to let them go out that way. They were, in fact, filled in pursuant to my dictation on the 5th and as internal evidence to that, I call attention to the fact that our subpoenas were in the language of the subpoenas used by the Louisiana Committee in obtaining this material from the police and I deliberately used this device as the best way to cover just what they had gotten and to get it all.

And I could not have had that language until I got down there and saw the subpoenas.

Q. The subpoenas are made returnable on October 29, 1963. Do you recall that? A. Yes, I believe that is right.

Q. Was that for any particular reason that you chose that date? A. It was a date far enough ahead to allow time for [44] transportation of records, if there had been any problem about that. It was a week day. I do not know of any other special reason.

Q. You appointed Colonel Burbank, the Commanding Officer of the Louisiana State Police, as custodian, did you not? A. I did. Appointed is perhaps a strong word. I

designated him. I made arrangements with him to so act. And when he had agreed, I gave him a letter confirming the agreement and specifying the conditions of the custodianship.

Q. Did the Committee, or subcommittee, by resolution authorize the submission of the subpoenas? A. No.

Q. Is it customary for them to do so? A. No.

Mr. Robb: You mean these particular subpoenas?

Mr. Brener: These particular subpoenas.

* * *

Motion for Preliminary Injunction

The plaintiffs, James A. Dombrowski and Southern Conference Educational Fund, Inc., by their attorney, Walter E. Dillon, Jr., moves the Court for an order granting a temporary restraining order and preliminary writ of injunction against the defendants, Senator James Eastland and J. G. Sourwine their agents and employees, pending this suit, and until further order of the Court, upon the grounds and in accordance with the prayers as set forth in the complaint filed herein.

WALTER E. DILLON, JR.,
Attorney for Plaintiffs.

Affidavit of James O. Eastland

JAMES O. EASTLAND, United States Senator from Mississippi, first having been duly sworn, deposes and says:

1. I am United States Senator from Mississippi, and Chairman of the Committee on the Judiciary of the United States Senate and of the Subcommittee on Internal Security of that Committee.

2. I have read the complaint filed in this cause wherein I am named as a defendant. In particular, I have read paragraph 22 thereof.

3. I do not now have in my personal possession nor have I ever had in my personal possession either in the District of Columbia, or in the State of Mississippi or anywhere else, any of the documents, records or articles referred to in the complaint.

4. All such documents, records and articles, excepting those which have been returned to the Joint Legislative Committee on Un-American Activities of the State of Louisiana from which they were subpoenaed by the Subcommittee on Internal Security are now in the custody, possession and control of the Internal Security Subcommittee of the Committee on the Judiciary of the United States Senate and are being evaluated pursuant to the resolution adopted by the Subcommittee, November 14, 1963, a copy of which resolution is attached hereto and made part hereof as Exhibit A.

5. The subpoenas of the Subcommittee on Internal Security served upon the aforesaid Louisiana State Legislative Committee were authorized by me as Chairman of the Senate Committee on the Judiciary and the Subcommittee on Internal Security in a telephone conversation I

had with Mr. J. G. Sourwine, Counsel to the Subcommittee, on October 5, 1963, when Mr. Sourwine was in Baton Rouge, Louisiana.

6. I had nothing whatever to do with the acquisition of the SCEF material by the Louisiana Committee, or with the preparation, issuance, or service of the arrest and search warrants whereunder the Louisiana authorities obtained the material of SCEF which was later subpoenaed by the Senate Internal Security Subcommittee. I deny emphatically that I was party to any conspiracy to obtain and execute such warrants, or to subpoena the material.

JAMES O. EASTLAND,
United States Senator.

Exhibit A, Annexed to Foregoing Affidavit

November 14, 1963

Upon the conclusions of the testimony of the second of two witnesses heard in executive session, the Subcommittee considered and discussed the handling of material subpoenaed from the Joint Legislative Committee on Un-American Activities of the State of Louisiana.

Present: Senators Eastland, Dodd, Hruska, Dirksen and Scott.

After discussion, and on motion of Senator Dirksen, it was ORDERED that the Chairman be authorized to appoint a Task Force consisting of Senators Eastland, Johnston, Dodd, Hruska and Scott to evaluate the subpoenaed material progressively with respect to its value to the Subcommittee's investigation and to make determination from time to time respecting particular papers, documents, or other material to be inserted verbatim in the record of the Subcommittee; that all of the material not clearly irrelevant to the Subcommittee's investigation of Communist activity

generally, of Communist front activity, of Communist infiltration of organizations and groups, and/or the source of funds for Communist or Communist front activities be ordered into the Committee's hearing record by reference subject to the later determination of the Task Force respecting particular items which should be entered into the record verbatim; and that all of the original records obtained under the subpoena be photostated for the permanent records of the Subcommittee and, when so photostated, be returned promptly to the possession of the Joint Legislative Committee on Un-American Activities of the State of Louisiana.

JAMES O. EASTLAND
Chairman

I consent and agree to the foregoing procedure.

JOHN F. McCLELLAN
OLIN D. JOHNSTON
ROMAN L. HRUSKA

Affidavit of J. G. Sourwine

DISTRICT OF COLUMBIA, ss:

J. G. SOURWINE, being first duly sworn on oath, deposes and says:

1. From December 21, 1950, to January 21, 1955, I was Associated Counsel; from January 22, 1955 to January 24, 1956, I was Chief Counsel; from January 25, 1956, to January 31, 1956, and from October 1, 1956, to January 31, 1958, I was Associate Counsel; and from February 1, 1958, to the present I have been Chief Counsel of the Subcommittee of the Committee on the Judiciary of the United

States Senate to Investigate the Administration of the Internal Security Act and other Internal Security Laws, under S. Res. 366, 81st Congress, and (since March 1963) S. Res. 62, 88th Congress. This committee is also known as the Senate Internal Security Subcommittee.

2. The authority and purposes of the Internal Security Subcommittee are stated as follows in S. Res. 62:

> "to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950, as amended; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effect of subversive activities in the United States, its territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."

3. In 1954 the Internal Security Subcommittee investigated the Southern Conference Educational Fund, Inc., to determine what if any subversive influences were operating in or through that organization. Hearings were held in New Orleans, Louisiana, on March 18, 19, and 20, 1954. Among the witnesses who testified during these hearings was James A. Dombrowski, Executive Director of the Southern Conference Educational Fund, Inc.

4. The report of the Senate Internal Security Subcommittee on its investigation of the Southern Conference

Educational Fund, Inc., published in 1955, stated in part as follows:

> "The Southern Conference for Human Welfare was conceived, financed, and set up by the Communist Party in 1938 as a mass organization to promote communism throughout the Southern States. Earl Browder, former general secretary of the Communist Party in the United States, in a public hearing, identified the Southern Conference for Human Welfare as one of the Communist Party's 'transmission belts.' Under date of March 29, 1944, the Southern Conference for Human Welfare was cited by the Special Committee on Un-American Activities as a Communist front and, on June 12, 1947, by the Congressional Committee on Un-American Activities as a Communist-front organization 'which seeks to attract southern liberals on the basis of its seeming interest in the problems of the South,' although its 'professed interest in southern welfare is simply an expedient for larger aims serving the Soviet Union and its subservient Communist Party in the United States.'
>
> "2. The Southern Conference Educational Fund, Inc., was initially an adjunct of the Southern Conference for Human Welfare. After the exposure of the Southern Conference for Human Welfare as a Communist front, it began to wither and was finally dissolved, but the Southern Conference Educational Fund, Inc., continued. The official paper, the Southern Patriot, which was published by the Southern Conference for Human Welfare, was taken over by the Southern Conference Educational Fund, Inc., which professes the same ostensible purpose.
>
> * * *
>
> "Dr. James A. Dombrowski was identified as executive director of the Southern Conference Educa-

tional Fund, Inc., who immediately prior to the assumption of his present office, had been administrator of the Southern Conference for Human Welfare. Dr. Dombrowski was identified by a witness as one who, to the witness' certain knowledge, had been a member of the Communist Party. He was also identified by another witness as one who had accepted Communist Party discipline. * * * "

5. On several occasions prior to July 1963, Jack N. Rogers, Esquire, Counsel to the Joint Legislative Committee on Un-American Activities, State of Louisiana, asked me in my official capacity for information reflected in our files bearing upon various matters under investigation by the Louisiana Committee. Where public source information was available, it was furnished in response to these requests.

6. In July 1963, Mr. Rogers informed me that his Committee was investigating the Southern Conference Educational Fund, Inc. (hereinafter called SCEF), whose headquarters were in New Orleans, and in whose management James A. Dombrowski was still active. Mr. Rogers said that he thought the Committee would eventually subpoena the records of that organization. Knowing from public records that the Internal Security Subcommittee of the United States Senate had itself investigated SCEF in 1954, Mr. Rogers volunteered that if his Committee procured information which might be of interest to the Senate Committee, he would let the Senate Committee know. Sometime later, in August or September, 1963, Mr. Rogers asked me whether, if the Louisiana Committee subpoenaed the records of the SCEF, it might be possible for me and Mr. Mandel, Research Director of the Senate Committee, to come down to Louisiana, and assist in the evaluation of such records. I discussed the matter with Senator Eastland who stated that

it would depend upon what was found in the records; that if they should appear to be within the scope of the investigative authority of the Senate Committee then Mr. Mandel and I might go to Louisiana to look at them. Senator Eastland emphasized, however, that the Senate Committee had no interest in any debates or activities in which SCEF might have engaged with respect to civil rights or racial matters; that the Committee was interested only in material relating to Communist or Communist-front activities, especially Communist infiltration of mass organizations and the financing of Communist fronts.

7. At about 11:45 p. m., on October 4, 1963, while I was at my home in a suburb of Washington, I received a telephone call from Mr. Rogers who stated that his Committee had obtained the records of SCEF and that these records included a great deal of material which he believed would be of interest to the Internal Security Subcommittee. He asked that Mr. Mandel and I come down as soon as possible to assist in evaluation of these records. Mr. Mandel and I left Washington by air from Friendship Airport at 8:20 a. m., the next morning, October 5. We arrived at Baton Rouge shortly before 11 a. m., Baton Rouge time, on October 5.

8. Having been informed by Mr. Rogers and by Colonel Fred Alexander, Chief Investigator for the Louisiana Committee, of the nature of the documents and the content of certain particular documents which had been secured, I concluded that the records of SCEF in the possession of the Louisiana State Committee did in fact include a substantial quantity of material which would be of interest to the Internal Security Subcommittee of the United States Senate in pursuance of its investigative functions and within the limits of the directive which had been given to me by Senator Eastland. I thereupon reported my conclusion

to Senator Eastland by telephone, and recommended that all the material obtained by the Louisiana Committee be subpoenaed from that Committee by the Senate Internal Security Subcommittee. Senator Eastland authorized this to be done and thereafter on the same day, October 5, 1963, I served subpoenas duces tecum uponMr. Pfister, Chairman of the Louisiana Committee, Mr. Rogers and Colonel Alexander calling for the production of all this material. It should be noted that the date "this 4th day of October" on the subpoenas is a typographical error, as the subpoenas were not typed or served until after my arrival at Baton Rouge on October 5, 1963.

9. Immediately following the service of the subpoenas duces tecum on October 5, 1963, I took possession, on behalf of the Senate Internal Security Subcommittee, of all the SCEF material then in the hands of the Louisiana State Committee. I arranged with Colonel Thomas D. Burbank, Superintendent of the Louisiana State Police, for him to hold this material as custodian for the Senate Committee. Subsequently, two staff members of the Internal Security Subcommittee brought the material to the Committee's offices in Washington, D. C.

10. Evaluation by the Senate Committee of the material subpoenaed from the Louisiana Committee proceeded as speedily as possible. It soon became apparent that there was a substantial quantity of material which could not reasonably be expected to be of any value to the Senate Subcommittee in its investigations. This material was promptly prepared for shipment and returned to the Louisiana Committee, being shipped on November 8, 1963.

On November 14, 1963, the Internal Security Subcommittee formally considered the matter of evaluation and disposition of the material secured under subpoena from the Louisiana Committee, and approved a resolution ordering that all the material be placed in the Subcommittee's

record by reference, that it be photostated as speedily as possible, that upon completion of photostating the originals be returned to the Louisiana Committee, and that a task force of five Senators undertake the work of evaluating the material to determine which items should be placed in the record verbatim. A copy of this resolution is attached to the affidavit dated December 4, 1963, of Senator James O. Eastland filed herein.

Work under this resolution is proceeding, and it is anticipated that additional material will be shipped back to the Louisiana Committee each week until all of the material obtained under the subpoena has been returned.

11. The material in the possession of the Senate Internal Security Subcommittee relating to the Southern Conference Educational Fund, Inc., is being studied, evaluated, and used by that Subcommittee pursuant to its duty to make a complete and continuing study and investigation of the extent, nature, and effect of subversive activities in the United States and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement. The material is directly relevant to these matters. The material relates not only to the activities and personnel of the Southern Conference Educational Fund, Inc., but also to the connections between that organization and other organizations which appear to be Communist, Communist dominated, or Communist-front organizations, such for example as the Fair Play for Cuba Committee.

12. I had nothing whatever to do with the acquisition of SCEF material by the Louisiana Committee, or with the preparation, issuance, or service of the arrest and search warrants whereby the Louisiana authorities obtained the material of SCEF which was later subpoenaed by the Senate Internal Security Subcommittee. I deny emphatically that I was party to any conspiracy to obtain and execute such warrants, or to subpoena the material.

J. G. SOURWINE.

Praecipe to Withdraw Plaintiff's Motion for Preliminary Injunction

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

December 13, 1963

Civil Action No. 2678—63

JAMES A. DOMBROWSKI, *et al.*,

vs.

COLONEL THOMAS D. BURBANK, *et al.*

The Clerk of said Court will please withdraw the plaintiffs' preliminary motion for preliminary injunction without prejudice.

I hereby certify that on this 13th day of December, 1963, I mailed, postage prepaid a copy of this praecipe to Joseph M. Hannon, Assistant United States Attorney, U. S. District Court and to Roger Robb, Esq., Woodward Bldg., D. C. attorneys for defendants.

Walter E. Dillon, Jr.,
1625 Eye Street, N. W.,
Washington 6, D. C.,
Attorney for Plaintiffs.

Excerpt from Sourwine Deposition—as Corrected

[17] Q. Was there any further investigation by the subcommittee after 1954 into the Southern Conference Educational Fund or Dr. Dombrowski?

Mr. Robb: You mean prior to the present investigation?

Mr. Brener: Yes.

The Witness: I think the answer to that would be yes, in the sense that the Committee maintains a continuing interest in any organization which is subversive or which it considers to be a front organization.

In the sense of an actively pursued investigation to seek particular facts, I think the answer to your question would be, no. In the sense of continuing to maintain a file and to accumulate information which became available, I think the answer would have to be, yes.

* * *

[21] Q. I want to direct your attention to paragraph five of the affidavit you filed. A. Yes, sir; I have that before me. It begins, "On several occasions."

Q. Do you recall the first time you spoke to Mr. Rogers concerning that matter that is mentioned in paragraph five? You stated merely as being prior to July. Can you be more specific? A. Not much more specific. I do not think I heard from Mr. Rogers or knew about him before the Spring of 1962, and it may not have been until the Summer of 1962. I am just not clear. I think the first time that Mr. Rogers ever asked for any information it was a request for assistance in digging out available public source material on the so-called Black Muslims, and I am afraid I was a little disappointing to him, because we had very little help that we could give him on the situation.

Excerpt from Sourwine Deposition—as Corrected

I am not absolutely sure that that was the first request, but I think that is right.

Q. Is it correct that the first contact that you had with Rogers with respect to the SCEF was in July of 1963? A. I think that is right.

Q. Would you recall the date in July? A. No, I do not recall the date in July. It was after [22] the Fourth of July.

Q. You heard from him by telephone? A. I do not think so. I think he was here.

Q. In other words, he spoke to you personally? A. I think that is right.

Q. Can you tell us, as best you can recall, the substance of the conversation? A. Well, I think the substance of it is set forth in the affidavit. I will put it in different words, if you wish.

Q. That is quite all right. Did he mention, at that time, the possibility of police raids on the headquarters of the Southern Conference Educational Fund? A. No, he did not.

Q. He mentioned only subpoena; is that correct? A. I don't think he mentioned even subpoena at that time. I did, however, have an understanding that he was eventually, probably, going to subpoena the records of the SCEF.

Q. Reading from paragraph 6 of your affidavit where you state "Mr. Rogers said that he thought the Committee would eventually subpoena the records of that organization— A. Yes, I see this.

Q. Does that refresh your memory as to the conversation concerning subpoena? A. Yes.

[23] Q. Did he state whether he intended to subpoena the list of contributors, a member's list? A. No, there was no discussion about the particular records which would be subpoenaed.

Excerpt from Sourwine Deposition—as Corrected

Q. Was there any mention of the fact that in the 1954 hearings Dr. Dombrowski had refused to produce a list of contributors? A. No, there was not.

Q. There was none? A. No.

Q. What did you reply to Mr. Rogers when he told you of his plans?

Mr. Robb: What did he what?

Mr. Brener: Reply to Mr. Rogers when he told you of his plans.

Mr. Hannon: Plans. I object to the use of the word plans. I understood Mr. Sourwine to say Mr. Rogers said he thought.

Mr. Brener: I will rephrase the question.

By Mr. Brener:

Q. His proposed plans, his possible plans? A. I do not believe I made any specific reply to that. There was no reply called for. He was just giving me a piece of information.

Q. Did you convey this information to Senator Eastland? [24] A. I have no independent recollection of having done so. I may have.

Q. But you do not recall; is that right? A. No, I do not. I did not, at the time, consider it of particular importance.

Q. You stated that "some time later in August or September of 1963 Mr. Rogers asked me whether if the Louisiana Committee subpoenaed the records of SCEF, it might be possible for me and Mr. Mandel to come down and assist the evaluation." A. Yes.

Q. How did that conversation come about? Was it by long distance telephone? A. No, I think that was in person.

Q. Do you recall whether it was August or September? A. No. I have not been able to place that, sir, precisely. I think it was late August or early September.

Excerpt from Sourwine Deposition—as Corrected

Q. Did Mr. Rogers suggest why he would require your assistance in evaluating this material? A. Well, require is a pretty strong word. Mr. Rogers did indicate that he felt that Mr. Mandel, particularly, had a background which would enable him to be very helpful in evaluating any information they were able to get.

I think that would be true with regard to any Communist front activity or any subversive activity. Mr. Mandel is a very knowledgeable man in this field. I do not [25] pretend to be as knowledgeable or nearly as knowledgeable as Mr. Mandel is myself, but Mr. Rogers was good enough to include me in the invitation.

Q. Did he discuss, at that time, how he proposed to get the material? A. No, I do not believe it was specifically discussed. But, certainly, any discussion of it was in the connotation of subpoenaing the material. As a matter of fact, I did not know until after the material had been secured that it had not been secured through subpoena.

It was my understanding that Mr. Rogers had intended to subpoena the material and he changed his line of approach on that practically at the last minute and did it the other way.

Q. Was there any discussion, at that time, of contributor lists? A. You mean, at the time when Mandel and I—it was suggested we should come to Louisiana, if we could?

Q. Yes. A. No, there was not.

* * *

[31] Now you state that about 11:45 p.m. on October 4—

Mr. Robb: Where are we now?

Mr. Brener: Paragraph 7.

Excerpt from Sourwine Deposition—as Corrected

By Mr. Brener:

Q. —that you received a call from Mr. Rogers concerning the fact that his Committee had obtained the records of the Southern Conference Fund. Had you heard from Mr. Rogers at all since his visit to you in August or September?

That is, between that time and the time of this telephone call on October 4th? A. I am sure I had. I think I may have had one or two letters from him, and I may have had one or two phone calls from him.

Q. Do you recall the nature of the conversations in the course of the telephone calls or the substance of the letters? A. I can tell you they did not concern the SCEF, if that is what you are trying to get at.

[32] Q. I am trying to find out. In other words, between the August and September visits to you in Washington and the call of October 4, there was no communication between you and Mr. Rogers concerning SCEF; is that correct? A. To the best of my recollection that is correct; yes, sir.

Q. Where did this call on October 4 reach you? Where were you at the time? A. At my home in Silver Springs.

Q. Did Rogers tell you where he was calling from? A. No, he did not. I assumed he was calling from Baton Rouge. That is where he lives.

Q. What did he tell you precisely? A. The information he conveyed to me was that the Louisiana State Committee had possession of the records and files, all of the records and files, he said, of the Southern Conference Educational Fund, and that he thought that there was a great deal of material in there that would be of interest to us.

* * *

[34] Q. Was there any particular urgency that caused you to leave within 6 or 7 hours of the telephone call? A. No, there was no urgency beyond the fact that Jack was

excited about what he considered important evidence and was what I thought naturally anxious to proceed with the evaluation of it.

It was a weekend. It was a good time to go. I had in mind we could go down and if we could settle the question, I could be back the following Monday. I had to be back the following Monday in Washington.

* * *

[44] Q. Would you please look at this letter of October 5th? A. Yes, sir; I have looked at it.

Q. In this letter— A. This is my letter of October 5th to Colonel Burbank.

* * *

[46] Q. You note that that refers to subpoena of October 4. Is that another error? A. I am not sure. The subpoenas did bear that date, but the date was in error.

Q. When was this letter typed? A. October 5.

Q. At the same time when the subpoenas were typed? A. Not at the same time but a short time subsequent.

Q. The same afternoon? A. The same afternoon.

Q. By the same individual? A. By the same girl, yes, sir.

Q. Did you note at the time you signed this that it referred to the subpoena of October 4? A. I did not note it in the sense of catching the discrepancy; no, sir. I did read it. I did not, however, dictate it. I dictated it, "In discharging," and so forth. I said, "put in the date of the subpoena."

* * *

[47] Q. You recall clearly that the instructions you gave to the stenographer were to type in today's date, is that [48] correct, on the others, fill in the date of the subpoenas? A. I do not believe I gave her any specific instructions with regard to the date to put in on either the letter or the subpoenas. I assumed they would be

today's date. When I was dictating the text of the letter, I dictated it about like this:

"Dear Colonel Burbank: By direction of the Chairman and on behalf of the Internal Security Subcommittee"—I note now for the first time that the word "Security" is left out of this letter. I never noticed that before. I am sure I dictated, "Internal Security Subcommittee of the U. S. Senate, I have requested, and you have agreed, that you act for the Committee as temporary custodian of all those certain letters, documents, memoranda and other papers turned over to the Internal Security Subcommittee on this date by the Joint Legislative Committee on Un-American Activities, pursuant to the Committee's subpoena of"—and then I said, "Go ahead and identify the subpoena and the persons." Then I went on to say, "It is understood," and so forth.

Q. Now, subsequently, did you know of a hearing that was to take place in New Orleans in the Criminal District Court at the end of October, October 25, involving the validity of the warrant issued for the arrest of Dombrowski, Ben Smith, a resident of New Orleans, and Bruce Waltzer, a resident of New Orleans, arising out of these raids?

> [49] Mr. Hannon: Objection to whether they were raids. Is it one hearing you refer to, Mr. Brener, for all these people?
>
> Mr. Brener: That is correct.
>
> The Witness: I think I read about that hearing before it took place. I know I was informed about it after it took place.

By Mr. Brener:

Q. When were you informed about it, after it took place?

Excerpt from Sourwine Deposition—as Corrected

Mr. Robb: Can you give us the date of the hearing?

Mr. Brener: October 25, 1963.

The Witness: I cannot remember, Mr. Robb, with regard to a particular date, but I am trying to remember it with regard to when it took place. I think I learned of it the day after the hearing.

By Mr. Brener:

Q. And how did you learn of it? A. I am not sure whether I learned of it first through a telephone call from Mr. Rogers or through an inquiry from a newspaperman. I had several of the latter on that day, that is, the day following the hearing.

Q. Did you, in fact, receive a telephone call from Mr. Rogers within a day or two after the hearing? A. I did.

Q. And what was the substance of that call? [50] A. Mr. Rogers told me that the judge in New Orleans had turned these people loose. That is the substance of the call.

Q. Where were you when you received the call? A. I received it at my office.

Q. At your office? A. Yes, sir; in the Senate Office Building.

Q. Did you, subsequently, within a day or two, learn of a suit filed in the Federal District Court in New Orleans, seeking return of the various documents that had been seized by the local police and damages? A. Yes, I subsequently did learn of such an action. And, of course, it was an action filed here which leads to this.

Q. But prior to this action, you had learned of the action filed in New Orleans; is that correct? A. Now, I am not sure about that. I am not sure that I heard about the New Orleans action before I heard about this action. I may have.

Mr. Robb: Do you have the date when that was filed?

Excerpt from Sourwine Deposition—as Corrected

Mr. Brener: It would have been filed on Sunday, actually, which would have been the 27th.

The Witness: I think I first learned of the action in Louisiana by reading it in the newspaper. And I am not sure whether I read that clipping before or after I learned of the action filed here which included me as a defendant.

[51] Mr. Robb: You say that was filed on a Sunday?

Mr. Brener: Yes.

Mr. Robb: Do they file cases on Sunday down there?

Mr. Brener: That is what the rules say.

The Witness: I do not know. You say it was filed on the 29th, unless I misunderstood you. I do not think the 29th would have been a Sunday.

Mr. Brener: No, the 27th. If I said the 29th, I was in error. I said the 27th, I believe.

The Witness: I am sorry. I may have misunderstood you.

Mr. Robb: I have a photo copy of Civil Action No. 1397.

Mr. Brener: That is the one.

Mr. Robb: And the date of the summons is October 29, 1963.

Mr. Brener: It may be the date on the summons. I will simply make a statement on the record that according to the rules of our courts a document is filed when it is presented to the court.

Mr. Robb: What?

Mr. Brener: We submitted it to Judge Ainsworth.

Mr. Robb: I would like to get straight on this. That is all. That is the same suit you are talking about?

Excerpt from Sourwine Deposition—as Corrected

Mr. Brener: The same number you just read, Mr. Robb.

[52] *By Mr. Brener:*

Q. Did you learn on that Sunday, October 27, of a suit filed in the Federal District Court in New Orleans? A. On that Sunday?

Q. On Sunday. A. No, I do not think so.

Q. Were you made aware of a telegram sent to Senator Eastland, advising of a hearing on a request for a temporary restraining order to be held Monday, the 28th? A. Yes, I heard from Senator Eastland about a telegram, but it did not advise of any suit filed.

Q. What did it advise? A. It did not advise of any action pending.

Q. What did it advise? A. Now, I have never seen that telegram, because Senator Eastland read it to me over the telephone, but as near as I can remember that telegram said about this: Federal Judge Ainsworth—it may have given his first name—is expecting you in his chambers at a named time, the 28th, to discuss a preliminary injunction, or words to that effect, signed by a Mr. Bender.

Mr. Brener: Brener.

The Witness: Brener.

Mr. Brener: I will state, for the record, I did not send that telegram to Senator Eastland. I did not direct it to go to Senator Eastland.

[53] *By Mr. Brener:*

Q. Did he send a telegram requesting a restraining order? A. No, the telegram did not say anything about a request for one. It was cryptic in that regard. It simply said, to my best recollection, what I have outlined, that

Ainsworth was expecting him, Judge Ainsworth expected him in his chambers to discuss a preliminary injunction matter.

It did not say whether it was pending, to be filed against whom, or advising what.

Mr. Robb: Do you have a copy of that?

Mr. Brener: I want to read it into the record and then I will let you see it.

The Witness: Am I pretty close?

By Mr. Brener:

Q. Does this wording sound familiar to you? "Federal Judge Robert Ainsworth has requested your presence in his office 9:30 a.m., October 28, to discuss an injunction enjoining turning over SCEF and Smith and Waltzer records to Senator Eastland."

Mr. Brener: Let the record show I am exhibiting a copy of what I have just read to the witness.

The Witness: This appears to be a copy of a telegram actually sent. It does not bear a Western Union stamp and I do not remember this phrase "enjoining turning over SCEF and Smith and Waltzer records to Senator Eastland."

[54] This may have been read to me by Senator Eastland. He may have stopped reading when he got to the word "injunction." I do not know.

By Mr. Brener:

Q. What makes you think he stopped there? A. Simply because I do not remember the rest of it. He may very well have read it and it may have passed my memory. In further response to your prior question, I still do not see any-

thing there that there is an injunction or that an action has been instituted.

Mr. Robb: Could we have that marked, please?

The Witness: Is that dated the 29th, too?

Mr. Brener: The 27th. I am marking this Plaintiffs' Exhibit 3 for identification.

(Plaintiffs' Exhibit No. 3 was marked for identification.)

By Mr. Brener:

Q. What was the nature of Senator Eastland's call to you when he read the text of a telegram? A. Senator Eastland called me and said, "I have this telegram." I might say, sir, I am testifying now concerning matters which normally would be within the attorney-client privilege, but in anticipation of questions about this, I asked Senator Eastland about it and he said he had no objection to my recounting it, and so I will do so. And then he read me a [55] telegram, I guess he read it or closely paraphrased it.

He said, "I do not see how this thing is in any way binding on me." And I said, "Clearly, it is not. If this was a summons, it would be signed by the judge or an officer of the court."

And the Senator then instructed me to have the records which were in our possession in the custodianship of Colonel Burbank moved, started on their way, to Washington. We had some little discussion about the problem involved in getting transportation to get them up here.

We would have to hire a truck and it would be difficult to do it on this day. And the Senator said, "Well, get them started." He said, "Get them over to Woodville and, if necessary, you can leave them with the Chancery Clerk

Excerpt from Sourwine Deposition—as Corrected

there, and then have the Committee boys pick them up and take them on from there."

So that is the way we handled it. I dictated a wire, over the telephone, to Colonel Burbank, instructing him to have the records transported, or to transport them, or cause them to be transported, I forget the exact words, to Woodville, and that his responsibility would end when he turned them over to the Chancery Clerk at Woodville.

Q. Mr. Sourwine, I want to show you a document I have marked Exhibit— A. I have not finished. May I finish?

Q. I am sorry. [56] A. I had previously tried to reach Colonel Burbank by telephone, unsuccessfully, and then I dictated this wire and I thereafter called Mr. Rogers and told him what I had instructed Colonel Burbank to do, and asked him if he could get in touch with Colonel Burbank and to let me have some word back from him or Burbank that the instructions would be complied with.

Now that is the sum total of what I did about it. Now, what is this? This appears to be a copy of the wire I dictated over the telephone. "By direction Chairman you are instructed—this says eructed—transport material you hold as custodian for subcommittee to Woodville, Mississippi, and there transfer custody to Chancery Clerk, at which moment your custody and responsibility will end. Chairman instructs thanks your fine cooperation."

And my name and title.

Mr. Brener: This is Plaintiffs' 4 for identification.

(Plaintiffs' Exhibit No. 4 was marked for identification.)

By Mr. Brener:

Q. Did Senator Eastland give you any idea as to why he changed his original instructions which called for pro-

duction of the documents on the 29th? A. That was not changed until afterward. After the subpoenas had been served and they had voluntarily turned all the material over to us, it became unnecessary, thereafter, to [57] have a subpoena duces tecum enforced for the production of those documents in Washington on a particular day. And, thereafter, when it became inconvenient to hold a hearing on that day, the documents turned out to be as voluminous as we had expected, the evaluation is still proceeding within the Committee, the hearing on the 29th was cancelled and the parties were notified as to that.

Q. Why was the telegram sent at 11:43 at night, if that is a fact? A. The telegram was sent with reasonable speed in doing the things I have told you, in the order I told you about them, I think. This is what happened. I got the call from Senator Eastland.

It was in the evening. It was fairly late in the evening. I tried to reach the Colonel by phone and could not do it. I dictated the telegram and then I called Rogers and that stopped it.

Now as to why I acted with this dispatch, it is my custom to act with all possible dispatch whenever I get a positive instruction from the Chairman. I have come to learn that is what he wants and that is what he gets.

Q. Was it your understanding that there was any connection between the request for injunction and the sudden removal of the documents from the State of Louisiana? A. I did not know about a request for an injunction, sir, [58] but certainly I had in my mind—and I imagine Senator Eastland had in his mind—the fact that if there was to be litigation about the documents, nobody should be dragged into it and involved in it except the Committee and the Committee personnel, and that the documents should be taken out of the possession of a custodian who held an official position with the State and might, because he wore

two hats, one as head of the State Police and one as custodian for us, become involved in an awkward situation.

Now I did not discuss this with Senator Eastland, but I admit that I did have that possibility in mind.

Q. Was it your understanding that the other members of the Internal Security Subcommittee knew of this proposed act for the sudden transfer of the documents? A. No, it was not my understanding. It was not discussed with Senator Eastland at all. I doubt whether there was any communication between him and them. There may have been.

Q. Has this sequence of events that you have described been brought to the attention of the other members of the subcommittee? A. I think it has been brought to the attention of all of the members of the subcommittee; yes, sir.

Q. Is it correct that the purpose of the removal of the documents was to put them beyond the jurisdiction of the Federal Judge in New Orleans? [59] A. This is correct. The Federal Judge would have had no jurisdiction under any circumstances. They were in the possession of the United States and no Federal court would have had any jurisdiction over them at all.

Q. So this removal was not for that purpose? A. No, not to my knowledge.

Q. Do you know when the documents were actually moved to Woodville? A. No, I do not know. I have always assumed they started on their way within a few hours after I sent the telegram.

Q. At one o'clock in the morning? A. Well, I do not know the particular time, but I received a telephone call from Mr. Rogers the following morning, or maybe it was from Mr. Alexander, I am not sure, one or the other, telling me that the documents were on their way and that fairly early in the morning.

I just assumed that they were moved right up.

Excerpt from Sourwine Deposition—as Corrected

Q. We are talking about approximately 80 large cartons of documents, are we not? A. We are talking about a truck load of documents; yes, sir.

Q. And you indicate that it would be normal for you to give such instructions at 11:40 at night for the removal of that quantity of documents? A. Sir, my testimony is on the record. If you want to [60] challenge it, you bring somebody that has some basis for challenging it. Do not sit here and impugn what I have told you as untrue.

Q. Is it normal procedure for you to give such instructions at 11:40 at night, even in the absence of any proposed litigation possibly affecting the documents? A. That is a loaded question. I have told you that it is my policy and practice to implement Senator Eastland's instructions as speedily as I can. I do not think I have ever had an instruction from him in all the time I have served under him as Chairman that was not implemented as speedily as I could after he gave them to me.

And I have had instructions some times later than 11 o'clock at night. I have never gone to bed on an instruction from the Chairman without doing everything I could to implement it before going to bed.

Q. Now you have been either Counsel or Assistant Counsel to this Committee since 1950 except for an 11-month period? A. That is correct.

Q. I want to ask you whether or not his instructions to remove this to the Chancery Clerk of Mississippi impressed you as being odd or unusual or out of the ordinary insofar as routine procedures are concerned? A. Well, you have several points there. Certainly it was out of the ordinary. It did not impress me as odd and my [61] handling of the instructions was routine with me. I did it as speedily as I could, after I got the instructions.

* * *

Excerpt from Sourwine Deposition—as Corrected

[75] Q. One more question about the subpoenas that were issued on the 5th. Do you recall if you instructed the young lady who filled in the subpoenas to type in today's date, that is, the date on which they were typed, or whether they were to be back-dated? A. I do not recall giving her any instructions at all about the date.

Q. You gave her no instructions at all? A. I do not recall having given her any. I think if I did give her any, I said "today's date." I do not believe I gave her any instructions about the date. This girl is an experienced legal stenographer. You do not spell out everything.

Q. You told her the return date; is that correct? A. I did.

Q. And you gave her the description of the documents that were being subpoenaed? A. No, I did not say that. I said, "Take the description from the subpoenas," and I gave her a copy of the subpoenas that had been used in obtaining them for the police.

* * *

[77] *Recross-examination by Mr. Hannon*:

Q. Mr. Sourwine, let me ask one question, if I may. From the date October 5, including October 5, up to the present time, what has your position been? A. Chief Counsel, Internal Security Subcommittee, United States Senate.

Q. And with respect to these questions Mr. Brener has been asking you this afternoon, were you at all times functioning in your official capacity as Chief Counsel of the Internal Security Subcommittee? A. I was.

* * *

Affidavit of James H. Pfister (Filed as Exhibit No. 1 to Defendants' Motion)

STATE OF LOUISIANA }
PARISH OF ORLEANS } ss.:

BEFORE ME, the undersigned authority, duly qualified and commissioned in and for the Parish and State above written, personally came and appeared:

JAMES H. PFISTER who, having been duly sworn, did depose and say:

My name is James H. Pfister and I reside at 335 18th Street, New Orleans, Louisiana.

On December 5, 1959, I was elected to the House of Representatives of the Legislature of the State of Lousiana, and on the second Monday in May 1960, I was sworn into office and I am still serving in this capacity.

Representatives Tessier, A. D. Brown and I introduced and sponsored House Concurrent Resolution No. 13, at the Regular Session of the 1960 Legislature, the purpose of which Resolution was to establish the Joint Legislative Committee on Un-American Activities for Louisiana. This Resolution was unanimously adopted by the House and the Senate and approved by Governor Jimmie H. Davis in July 1960. A copy of this Resolution is attached to this affidavit as Exhibit A.

Shortly after the Resolution was approved, and pursuant to the requirements of the Resolution, five Senators were appointed to the Joint Legislative Committee on Un-American Activities by the President of the Senate and in like fashion five members of the House of Representatives were appointed to the Committee by the Speaker of the House. I was elected Chairman of the Committee at the first meeting of the Committee and have served as Chairman ever since. Hereinafter, the Joint Legislative Committee on Un-American Activities for the State of Louisiana shall be referred to as the Joint Committee.

Affidavit of James H. Pfister (Filed as Exhibit 1 to Defendants' Motion)

Sometime during 1962 the Joint Committee became interested in the activities of the Southern Conference Educational Fund, Inc., the offices of which were located at 822 Perdido Street, New Orleans, Louisiana. This interest was stimulated in part by the knowledge of the Joint Committee of a report published in 1955 by the Internal Security Subcommittee of the United States Senate in which the Southern Conference Educational Fund, Inc. was found to be a communist front.

The Joint Committee instructed its Staff Director, Colonel Frederick B. Alexander, and its Committee Counsel, Jack N. Rogers, to have the Joint Committee staff conduct an investigation of the Southern Conference Educational Fund, Inc. (hereinafter called SCEF). Such an investigation was undertaken and as part thereof Mr. Rogers was authorized by the Joint Committee to go to Washington, D. C., to consult with the Internal Security Subcommittee of the United States Senate.

Sometime during September of 1963 at a meeting of the Joint Committee, Colonel Alexander and Mr. Rogers informed the Joint Committee of the facts relating to SCEF uncovered by the staff investigation up to that point. Mr. Rogers expressed the opinion that the operations of SCEF were in violation of Louisiana criminal statutes relating to subversive activities. The Joint Committee concurred in this opinion and instructed Mr. Rogers and the Staff Director to take the matter up with the Louisiana State police authorities.

On the night of October 4, 1963, pursuant to a telephone call I received from Mr. Rogers, I went to the New Orleans Police Academy, New Orleans, Louisiana, where I met Mr. Rogers. Mr. Rogers informed me at this time that the police authorities had seized the books, records and documents of SCEF and he described the nature of some of the documents to me. I thereupon authorized Mr. Rogers to serve a subpoena upon the appropriate authority to require

Affidavit of James H. Pfister (Filed as Exhibit 1 to Defendants' Motion)

the production before the Joint Committee of all books, records and documents seized from SCEF.

On the following day, October 5, 1963, Mr. J. G. Sourwine of the Internal Security Subcommittee of the United States Senate served United States Senate subpoenas on Mr. Rogers, Colonel Alexander and me requiring the production of the same books, records and documents of SCEF before his subcommittee. Access to the books, records and documents was allowed us between October 5 and October 27, 1963, pending their transportation to Washington, D. C., pursuant to Mr. Sourwine's subpoenas.

The Joint Committee held a hearing involving SCEF on November 8, 1963, at which time copies of many of the documents seized from SCEF were introduced into evidence. Upon the basis of the evidence produced, the Joint Committee resolved as a legislative finding that SCEF was a communist front and a subversive organization, aiding and abetting the communist conspiracy.

I do not know Senator James O. Eastland nor have I ever met him. I have never communicated with him or contacted him in any way either directly or indirectly. Nor have I ever had anything to do with Mr. J. G. Sourwine except on October 5, 1963, when he served a subpoena upon me. This was my first and only meeting with Mr. Sourwine and the only time I ever spoke to him. Finally, I wish to state that neither Senator Eastland nor Mr. Sourwine ever had anything to do with determinations made by me or by the Joint Committee regarding what action should be taken concerning SCEF, its personnel, and its records.

JAMES H. PFISTER.

SUBSCRIBED AND SWORN to before me, a notary public, at New Orleans, Louisiana, this 4th day of January, 1964.

.....
Notary Public.

Exhibit A, Annexed to Foregoing Affidavit

By: Messrs. Pfister
Tessier and
A. D. Brown

House Concurrent Resolution No. 13
Regular Session, 1960
A Concurrent Resolution

Whereas, this state and this country face grave public danger from enemies both within and without our boundaries, and

Whereas, these subversive groups and persons under the color of protection afforded by the Bill of Rights of the United States Constitution seek to destroy us and the ideals for which we fought to preserve and subject us to the domination of foreign powers and ideologies, and

Whereas, Louisiana, as one of the laboratories of this great country, may study profitably this problem within its boundaries and enact remedial legislation if facts therefor are made available, and

Whereas, necessary and desirable legislation to meet this grave problem and to assist local enforcement officers to be effective must be based on a thorough and impartial investigation by a competent and active legislative committee.

Therefore, Be It Resolved by the House of Representatives of the Legislature of the State of Louisiana, the Senate concurring therein, that there is hereby created the Joint Legislative Committee on Un-American Activities which Committee shall consist of ten members, five to be appointed by the Speaker of the House of Representatives

from the membership of the House and five to be appointed by the President of the Senate from the membership of the Senate which committee shall study, investigate and analyze all facts relating directly or indirectly to the subject expressed in the recitals of this resolution; to the activities of groups and organizations which have as their objectives, or as part of their objectives, the overthrow of the State of Louisiana, or of the United States by force, violence or other unlawful means; to all organizations known to be or suspected of being dominated or controlled by a power seeking to impose a foreign political theory upon the government and people of the United States; to all persons who belong to or are affiliated with such groups or organizations; and to the manner and extent in which such activities affect the safety, welfare and security of this state in National Defense, the functioning of any state agency, unemployment relief and other forms of public assistance, educational institutions in this state including but not limited to the operation, effect, administration, enforcement and needed revision of any and all laws in any way bearing upon or relating to the subject of this resolution.

BE IT FURTHER RESOLVED that the Committee shall have the authority to:

(a) Select a chairman and a vice chairman from its membership; and to employ and fix the compensation of a secretary and such clerical, investigative, expert and technical assistants as it may deem necessary.

(b) Contact and deal with such other agencies, public or private, as it may deem necessary for the rendition and affording of such services, facilities, studies and reports as will best enable the committee to carry out the purposes for which it is created.

(c) Cooperate with and secure the cooperation of parish, city, city and parish, and other local law enforcement agencies in investigating any matter within the scope of this resolution,

(d) Cooperate with and meet with similar committees of other states and of the Federal Government, or representative thereof, outside of this state, and expenses necessarily incurred in connection therewith by any of the members or staff of the committee, thereunto duly authorized by the chairman, shall constitute a proper charge against the sums allocated to the committee,

(e) Do any and all other things necessary or convenient to enable it fully and adequately to exercise its powers, perform its duties, and accomplish the objects and purposes of this resolution, and

(f) Adopt and from time to time amend such rules governing its procedure as may appear appropriate.

BE IT FURTHER RESOLVED that every department, commission, board, agency, officer and employee of the State Government of Louisiana and of any political subdivision, parish, city or public district of or in this state, shall furnish the committee and any subcommittee, upon request, any such information, records and documents as the Committee or subcommittee deems proper for the accomplishment of the purposes for which the committee is created; provided, however, that this provision shall not extend to, nor shall it be construed to make available to the committee or any subcommittee thereof, any record or other document excluded from the application of the Public Records Act, as found in Part I of Chapter I of Title 44 of the Louisiana Revised Statutes of 1950, or any other record or document which under the law is made a confidential record.

Exhibit A

BE IT FURTHER RESOLVED that the committee shall have the power and authority to hold hearings at any place in Louisiana, which meetings may be public or private, to subpoena witnesses, administer oaths, require the production of books and records pertinent to any inquiry before the Committee and to do all other things necessary to accomplish the purposes of this resolution.

BE IT FURTHER RESOLVED that the Committees shall have authority to apply to any court of competent jurisdiction for enforcement of any order issued by it for the production of books, records or other documents or to compel the attendance of any witnesses subpoenaed to appear before it and, upon request of the commission, the Attorney General shall prosecute any witness who is guilty of refusal to testify or who gives false testimony, and persons guilty of false swearing or of giving false testimony shall be punished in accordance with the criminal laws of this state relating to false swearing or perjury, as the case may be, and

BE IT FURTHER RESOLVED that the committee shall submit its findings and recommendations to the Legislature at each of its regular sessions and at such other times as the committee may deem necessary and desirable.

BE IT FURTHER RESOLVED that the members of the committee created herein shall serve without compensation but shall receive the same per diem and travel allowance in the performance of their duties as is provided for members of the Legislature.

BE IT FURTHER RESOLVED that the per diem and travel allowance herein authorized and all other expenses incurred by the committee shall be paid out of funds available to the presiding officers of the two houses of the Louisiana Legislature for expenses of the Legislature and Interim Committees; provided, however, that the disbursements for all expenses incurred by the committee, including the payment

Affidavit of Jack N. Rogers (Filed as Exhibit 2 to Defendants' Motion)

of per diem and travel allowances for members as herein authorized shall be approved by the chairman of the committee.

.....

Speaker of The House of Representatives

.....

Lieutenant Governor and President of The Senate

Approved: .....

Affidavit of Jack N. Rogers (Filed as Exhibit 2 to Defendants' Motion)

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE } ss.:

BEFORE ME, the undersigned authority personally came and appeared: JACK N. ROGERS, who, after first being duly sworn, did depose and say:

I am a member of the bar of the State of Louisiana and of the Supreme Court of the United States. I am engaged in the general practice of law in Baton Rouge, Louisiana. My home address is 1213 Knollwood Drive, Baton Rouge, Louisiana, and my office address is 840 Commerce Building, Baton Rouge, Louisiana. Since March, 1961, I have been counsel for the Joint Legislative Committee On Un-American Activities of the Legislature of the State of Louisiana, hereinafter referred to as the Joint Committee.

The Joint Committee was created by House Concurrent Resolution No. 13, Regular Session, 1960, of the Louisiana Legislature, hereinafter referred to as Resolution No. 13. That resolution provided in part:

> "WHEREAS, this state and this country face grave public danger from enemies both within and without our boundaries, and

Affidavit of Jack N. Rogers (Filed as Exhibit 2 to Defendants' Motion)

WHEREAS, these subversive groups and persons under the color of protection afforded by the Bill of Rights of the United States Constitution seek to destroy us and the ideals for which we fought to preserve and subject us to the domination of foreign powers and ideologies, and

WHEREAS, Louisiana, as one of the laboratories of this great country, may study profitably this problem within its boundaries and enact remedial legislation if facts therefor are made available, and

WHEREEAS, necessary and desirable legislation to meet this grave problem and to assist local enforcement officers to be effective must be based on a thorough and impartial investigation by a competent and active legislative committee.

THEREFORE, BE IT RESOLVED by the House of Representatives of the Legislature of the State of Louisiana, the Senate concurring therein, that there is hereby created the Joint Legislative Committee on Un-American Activities which Committee shall consist of ten members, five to be appointed by the Speaker of the House of Representatives from the membership of the House and five to be appointed by the President of the Senate from the membership of the Senate which committee shall study, investigate and analyze all facts relating directly or indirectly to the subject expressed in the recitals of this resolution; to the activities of groups and organizations which have as their objectives, or as part of their objective, the overthrow of the State of Lousiana, or of the United States by force, violence or other unlawful means; to all organizations known to be or suspected of being dominated or controlled by a power seeking to impose a foreign political theory

upon the government and people of the United States; to all persons who belong to or are affiliated with such groups or organizations; and to the manner and extent in which such activities affect the safety, welfare and security of this state in National Defense, the functioning of any state agency, unemployment relief and other forms of public assistance, educational institutions in this state including but not limited to the operation, effect, administration, enforcement and needed revision of any and all laws in any way bearing upon or relating to the subject of this resolution.

Be It Further Resolved that the Committee shall have the authority to:

(a) Select a chairman and a vice chairman from its membership; and to employ and fix the compensation of a secretary and such clerical, investigative, expert and technical assistants as it may deem necessary.

(b) Contact and deal with such other agencies, public or private, as it may deem necessary for the rendition and affording of such services, facilities, studies and reports as will best enable the committee to carry out the purposes for which it is created.

(c) Cooperate with and secure the cooperation of parish, city, city and parish, and other local law enforcement agencies in investigating any matter within the scope of this resolution.

(d) Cooperate with and meet with similar committees of other states and of the Federal Government, or representative thereof, outside of this state, and expenses necessarily incurred in connection therewith by any of the members or staff of the committee, thereunto duly authorized by the chair-

man, shall constitute a proper charge against the sums allocated to the committee."

Since the creation of the Joint Committee, and in carrying out its functions and purposes under the foregoing Resolution No. 13, it has studied, investigated, and analyzed the facts relative to a number of known or suspected subversive organizations operating in the State of Louisiana. Among such organizations which have been scrutinized by the Joint Committee is Southern Conference Educational Fund, Inc., hereinafter referred to as the SCEF. The offices of the SCEF were and are located at 822 Perdido Street, New Orleans, Louisiana. The Joint Committee's interest in the SCEF arose out of the fact that in 1954 the SCEF was found by the Internal Security Sub-Committee of the United States Senate after investigation, to be a communist front organization. The activities and purposes of SCEF have continued unchanged since 1954. Investigation by the Joint Committee prior to October 1963 disclosed that the direction and control of the SCEF and its publication, The Southern Patriot, were in the hands of persons who had at various times been identified by witnesses under oath as Communists. Among such persons were James A. Dombrowski, Executive Director of the SCEF; Aubrey Williams, President Emeritus; Carl Braden, Field Organizer and formerly Field Secretary of the SCEF and Editor of the Southern Patriot; Ann Braden, Editor, the Southern Patriot and formerly Field Secretary and Editor; and William Howard Melish, Eastern Representative (fund raiser) of the SCEF; Benjamin E. Smith, Treasurer of the SCEF, was also a national board member of The National Lawyers Guild, an identified communist front organization. Certain other officers or former officers of the SCEF had also been identified as communists.

In carrying out my duties as counsel to the Joint Committee pursuant to Resolution No. 13, I requested the In-

ternal Security Sub-Committee of the United States Senate to furnish me with such information as that sub-committee could properly give with respect to the SCEF. I made this request on or about July 17, 1963, of Mr. J. G. Sourwine, counsel of the Senate Sub-Committee. Mr. Sourwine did furnish me certain relevant and helpful information from the public records of his committee. I suggested to Mr. Sourwine that at some future time our Joint Committee might subpoena the records of the SCEF, and that if we did so, and if any material relevant to the responsibilities of his committee should be obtained, I would promptly let him know.

Around the middle of September, 1963, according to my best recollection, as to the time, I telephoned to Mr. Sourwine and asked him whether, in the event that the Joint Committee subpoenaed the records of the SCEF, he and Ben Mandel, a member of his staff, could help us to evaluate the material. My request for this assistance was prompted by the fact that I knew Mr. Sourwine and Mr. Mandel were experts in the field of subversive organizations and activities.

Pursuant to the Joint Committee's authority under Resolution No. 13, the staff of the Joint Committee also examined the files of the Louisiana State Police and of other Louisiana police agencies relative to the SCEF.

Having considered and analyzed the material and information that had been collected respecting the SCEF and its activities, I concluded, and so advised the Joint Committee, that the operations of the SCEF were in violation of the Louisiana criminal statutes dealing with subversive activities. The Joint Committee concurred in this conclusion, and directed me to take the matter up with the Louisiana State Police. Accordingly, on or about September 20 ,1963, I went to Colonel Thomas D. Burbank, Superintendent, Louisiana State Police, presented the facts of the matter to him, and requested that he have the State Police

Affidavit of Jack N. Rogers (Filed as Exhibit 2 to Defendants' Motion)

man, shall constitute a proper charge against the sums allocated to the committee."

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Around the middle of September, 1963, according to my best recollection, as to the time, I telephoned to Mr. Sourwine and asked him whether, in the event that the Joint Committee subpoenaed the records of the SCEF, he and Ben Mandel, a member of his staff, could help us to evaluate the material. My request for this assistance was prompted by the fact that I knew Mr. Sourwine and Mr. Mandel were experts in the field of subversive organizations and activities.

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Having considered and analyzed the material and information that had been collected respecting the SCEF and its activities, I concluded, and so advised the Joint Committee, that the operations of the SCEF were in violation of the Louisiana criminal statutes dealing with subversive activities. The Joint Committee concurred in this conclusion, and directed me to take the matter up with the Louisiana State Police. Accordingly, on or about September 20 ,1963, I went to Colonel Thomas D. Burbank, Superintendent, Louisiana State Police, presented the facts of the matter to him, and requested that he have the State Police

obtain and execute search warrants for the offices of the SCEF and the premises occupied by James A. Dombrowski and certain other officers of the SCEF. Colonel Burbank, thereupon designated Major Russell R. Willie as the officer to be in charge of the matter. I offered to assist the police in obtaining the warrants, and my offer was accepted.

On October 2, 1963, Major Willie and I appeared before the Honorable Thomas M. Brahney, Jr., Judge, Criminal District Court, Parish of Orleans. At this time Major Willie swore to applications for search warrants for the offices of the SCEF, and the residences of James A. Dombrowski, Benjamin E. Smith and Bruce C. Waltzer, Major Willie and I at the same time swore to applications for arrest warrants for Dombrowski and the other two. Being satisfied that probable cause existed, Judge Brahney signed and issued the warrants.

The warrants were executed by Louisiana State Police and New Orleans Police, all of whom were under the direction and supervision of Major Willie, on October 4, 1963, by the seizure of the materials described in the search warrants and the arrest of the persons named in the arrest warrants. Execution of the warrants was pursuant to the commands set forth therein.

Shortly after the execution of all of the warrants, and after a preliminary examination of the seized material by me, I served on Major Willie a subpoena duces tecum requiring the forthwith production of all of the seized material before the Joint Committee. At my direction Major Willie then transported the material to Baton Rouge, where it was held by the State Police as custodians for the Joint Committee.

At about 10:30 P. M. on October 4, 1963, after my return from New Orleans to Baton Rouge, I telephoned Mr. Sourwine at his home. I told him that it was plain to me that the SCEF material obtained by the Joint Committee would

Affidavit of Jack N. Rogers (Filed as Exhibit 2 to Defendants' Motion)

be of substantial interest to his sub-committee, and I urged that he and Mr. Mandel come to Baton Rouge to examine it as soon as possible. He indicated that they would try to be in Baton Rouge the next day, October 5, and they did arrive the next day.

After Mr. Sourwine and Mr. Mandel made some examination of the seized material, Mr. Sourwine prepared and served subpoenas upon me, the chairman, and the staff director of the Joint Committee, requiring the production of the material before the Internal Security Sub-Committee of the Judiciary Committee of the United States Senate. The subpoenas were typed on October 5, 1963, by Mrs. Laura Nicholson, an employee of the Joint Committee, at the Committee offices in the Old Capitol Building. At the same time Mr. Sourwine also had Mrs. Nicholson type several letters to Colonel Burbank, designating Colonel Burbank as custodian of the material for the Senate Internal Security Sub-Committee, and authorizing access to such material by representatives of the Louisiana Joint Committee.

Between October 5, 1963 and October 27, 1963, the staff of the Joint Committee examined, studied and copied a substantial amount of the seized material. We were assisted in this work for two days by Mr. Mandel. It may be said parenthetically that on November 8, 1963, the Joint Committee held a hearing in the SCEF matter, at which time copies of many of the seized documents were introduced in evidence. On the same day, and on the basis of the evidence produced, the Joint Committee resolved, as a legislative finding, that the Southern Conference Educational Fund, Inc., was a Communist front organization, and also a subversive organization, aiding and abetting the Communist conspiracy. A full report of this hearing was published by the Joint Committee on November 19, 1963.

Affidavit of Jack N. Rogers (Filed as Exhibit 2 to Defendants' Motion)

On October 27, 1963, at about 10 o'clock P. M., Baton Rouge time, Mr. Sourwine telephoned to me that he had been trying unsuccessfully to reach Colonel Burbank. He asked me to give Colonel Burbank Senator Eastland's instructions to move all the SCEF material to Woodville, Mississippi immediately; he said that a telegram containing such instructions to Colonel Burbank would follow. I promptly conveyed Senator Eastland's instructions to Colonel Burbank, and the materials were sent to Woodville the next morning.

Senator Eastland and Mr. Sourwine had nothing whatever to do with the seizure of the SCEF material by the Louisiana Police or the acquisition of such material by the Joint Committee. Their only connection with the entire matter was as set forth in this affidavit. Finally, I wish to make it entirely clear that at no time did I inform either Senator Eastland or Mr. Sourwine of the decision to proceed against the SCEF and its officers by way of arrest and search warrants rather than by way of subpoena.

JACK N. ROGERS

Sworn to and subscribed before, Notary, at Baton Rouge, Louisiana, this 25th day of January, 1964.

STEVE A. MITOOL JR.
Notary Public

Affidavit of Thomas D. Burbank (Filed as Exhibit 3 to Defendants' Motion)

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE } ss.:

BEFORE ME, the undersigned authority, duly qualified and commissioned in and for the Parish and State above written, personally came and appeared: THOMAS D. BURBANK, who, having been duly sworn, did depose and say:

That he is the duly appointed Director of Public Safety and Superintendent of State Police of the State of Louisiana, having been appointed by Honorable Jimmie H. Davis, Governor of Louisiana, on January 3, 1962, which appointment was confirmed by the Senate of the State of Louisiana. He has been an officer of the Louisiana State Police since 1941, when he was appointed a trooper. He graduated from the National Police Academy of the Federal Bureau of Investigation in 1954.

That prior to October 4, 1963, in his official capacity as head of the Department of Public Safety and the Division of State Police, affiant was informed by Jack N. Rogers, Chief Counsel for the Joint Legislative Committee on Un-American Activities of the Legislature of Louisiana, and Major Russell R. Willie, of activities being carried on by James A. Dombrowski and the Southern Conference Educational Fund, Inc., in New Orleans, Orleans Parish, Louisiana, as well as by Benjamin E. Smith and Bruce Waltzer, in violation of statutes of the State of Louisiana, particularly R. S. 14:358 et seq., and R. S. 14:390 et seq., which relate to communist and other subversive activities.

That on or about September 20, 1963, a request was made of affiant by Jack N. Rogers, on behalf of the Joint Legislative Committee on Un-American Activities and pursuant to House Concurrent Resolution No. 13, Regular Session, 1960, to have the Louisiana State Police conduct a search of the premises being used by the aforenamed individuals

Affidavit of Thomas D. Burbank (Filed as Exhibit 3 to Defendants' Motion)

and organization in violation of Louisiana's communist and subversive activities laws. Acting in his official capacity as Director of Public Safety and Superintendent of State Police, affiant designated Major Russell R. Willie as the State Police officer in charge of all police efforts to be undertaken by the department in this matter. Major Willie was and still is in charge of the Department's Bureau of Identification and Investigation.

The actions taken by affiant's subordinates on October 4, 1963, in arresting James A. Dombrowski and some of his associates and searching the premises of the Southern Conference Educational Fund, Inc., and James A. Dombrowski and his automobile were carried out pursuant to the directions contained in arrest and search warrants issued by Judge Thomas M. Brahney, Jr., on October 2, 1963.

That at no time did affiant enter into any plan or agreement under the color of State laws and statutes to deprive James A. Dombrowski or any other person of any rights, privileges and immunities granted to them as citizens of the United States of America by the laws and constitution of the United States, but rather he at all times conducted himself in his official capacity as a police officer whose duty it is to enforce the laws of the State of Louisiana and the United States of America and to uphold the constitutions of the State of Louisiana and the United States of America.

That affiant at no time authorized or instructed any of the State Police under his command to engage in any illegal activities. He at no time acted in an individual capacity in the matter of James A. Dombrowski and the Southern Conference Educational Fund, Inc., Benjamin E. Smith and Bruce Waltzer, but always acted in his official capacity as Director of Public Safety and Superintendent of State Police.

That affiant personally took no part in the searches and arrests made on October 4, 1963, in the City of New Orleans

Affidavit of Thomas D. Burbank (Filed as Exhibit 3 to Defendants' Motion)

involving the premises and persons of James A. Dombrowski, Benjamin E. Smith and Bruce Waltzer, and the premises of the Southern Conference Educational Fund, Inc.

That the documents seized on October 4, 1963, from the offices, residence and automobile of James A. Dombrowski and the Southern Conference Educational Fund, Inc., and Benjamin E. Smith and Bruce Waltzer, having been subpoenaed by the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature on October 4, 1963, were delivered to the headquarters of the Louisiana State Police by the Joint Legislative Committee on Un-American Activities for storage and safekeeping. That on October 5, 1963, the documents having been subpoenaed by the Internal Security Sub-Committee of the United States Senate, affiant was appointed temporary custodian of the documents by direction of the Chairman of the Internal Security Sub-Committee of the United States Senate.

That affiant, acting purely as custodian for said Sub-Committee of the United States Senate, did retain custody of all documents seized on October 4, 1963, until October 28, 1963, when by direction of Mr. J. G. Sourwine, representative of the Internal Security Sub-Committee of the United States Senate, he delivered them to Honorable J. Y. Chapman, Clerk of the Chancery Court, Wilkinson County, Woodville, Mississippi, and received his receipt therefor.

That affiant never had any communication, directly or indirectly, with Senator James O. Eastland or the Honorable J. G. Sourwine with respect to any action contemplated or proposed to be taken by the Louisiana State Police or the Louisiana Joint Legislative Committee in the matter of the Southern Conference Educational Fund, Inc., or James A. Dombrowski and his associates engaged in the operation, control and management of the Southern Conference Educational Fund, Inc. Nor has there ever

Affidavit of Russell R. Willie (Filed as Exhibit 4 to Defendants' Motion)

been any agreement or concert of action, direct or indirect, between affiant and Senator Eastland or Mr. Sourwine with respect to any proposed or contemplated action by the Louisiana authorities involving the Southern Conference Educational Fund, Inc., Dombrowski and his associates either jointly or severally.

THOMAS D. BURBANK,
Director of Public Safety,
State of Louisiana.

Sworn to and subscribed before me at Baton Rouge, Louisiana, this 3rd day of January, 1964.

JACK N. ROGERS,
Notary Public.

Affidavit of Russell R. Willie (Filed as Exhibit 4 to Defendants' Motion)

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE } SS.:

BEFORE ME, the undersigned authority, duly qualified and commissioned in and for the Parish and State above written, personally came and appeared RUSSELL R. WILLIE, who, having been duly sworn, did depose and say:

That he is employed by the Department of Public Safety, Division of State Police, State of Louisiana, in the capacity of Major at the State Police Headquarters, Foster Drive, Baton Rouge, Louisiana. That affiant has been employed by the Department of Public Safety in various capacities as a State policeman for a period in excess of twenty-one years.

Affidavit of Russell R. Willie (Filed as Exhibit 4 to Defendants' Motion)

That his primary duty as a Major of the Louisiana State Police is now and was in October 1963, to act as supervisor of the Bureau of Identification of that governmental agency; that among the various functions performed by said Bureau are the maintenance of finger print records forwarded to the Department by various law enforcement agencies throughout the State of Louisiana and the United States, the receipt and classification of all material dealing with known and suspected subversive organizations as well as individuals known to belong to or associate with said organizations. In addition, according to Louisiana state law all communists in the State of Louisiana and all individuals there who are knowingly members of a communist front organization as defined in the statute are required to register with the Department of Public Safety, and such registration is under the affiant's immediate supervision.

That in his official capacity as a State Police officer and in company with Jack N. Rogers, Esq., counsel for the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature, affiant on October 2, 1963, went to the Criminal District Court in New Orleans, Louisiana, and made application to Honorable Thomas M. Brahney, Jr., Judge of Section "D" Criminal District Court, Parish of Orleans, State of Louisiana, for certain search warrants and arrest warrants. These applications, which were sworn to by affiant on October 2, 1963, in the presence of Judge Brahney, were for warrants to search the premises occupied by the Southern Conference Educational Fund, Inc., the home and automobile of James A. Dombrowski, as well as other residences occupied by persons involved in the management and control of the Southern Conference Educational Fund, Inc. In addition and at the same time applications for the arrest of James A. Dombrowski, Bruce C. Waltzer and Benjamin E. Smith were sworn to by affiant

Affidavit of Russell R. Willie (Filed as Exhibit 4 to Defendants' Motion)

and Jack N. Rogers, Esq., in the presence of Judge Brahney. Based upon such sworn applications Judge Brahney held that probable cause existed for the issuance of the search warrants and warrants of arrest and he thereupon signed and issued them.

That the aforesaid search warrants and warrants of arrest were executed by the affiant and other police officers under his command acting in their official capacities, on October 4, 1963, by the arrest of James A. Dombrowski and others and the seizure of the books, records and files belonging to or identified with James A. Dombrowski and the management and control of the Southern Conference Educational Fund, Inc.

That shortly after the seizure of the books, records and files above described the State of Louisiana Joint Legislative Committee on Un-American Activities through its chairman, James H. Pfister, by subpoena served upon affiant, commanded affiant forthwith to deliver to said committee at New Orleans, Louisiana, all of the books, records and files of the Southern Conference Educational Fund, Inc., and of James A. Dombrowski, plus all communist political propaganda and communist party records, plus any other documentary evidence of subversive activities then in affiant's possession or legal custody as a result of the aforesaid seizures. Affiant did then and there make delivery of the seized material to Mr. Jack N. Rogers, counsel for the Committee, and Colonel Frederick B. Alexander, Staff Director, pursuant to the subpoena issued by the Legislature of the State of Louisiana through the Joint Legislative Committee on Un-American Activities and duly served on affiant.

Affiant further states that subsequent to the delivery of the seized material to the Joint Legislative Committee on Un-American Activities, to wit, on October 5, 1963, subpoenas were issued by Senator James O. Eastland, Chairman, Committee on Judiciary and Sub-Committee on In-

Affidavit of Russell R. Willie (Filed as Exhibit 4 to Defendants' Motion)

ternal Security of the Congress of the United States, directed to James H. Pfister, Chairman, Jack N. Rogers, Counsel, and Colonel Frederick B. Alexander, Jr., Staff Director of the Joint Legislative Committee on Un-American Activities, State of Louisiana, commanding the individuals named to deliver to said Committee of the United States Congress all documents, books, letters, papers, etc., seized on October 4, 1963, from James A. Dombrowski and Southern Conference Educational Fund, Inc. In compliance with said subpoenas all materials then in custody of the Louisiana Joint Legislative Committee on Un-American Activities were delivered on October 5, 1963, to the custody of the Honorable J. G. Sourwine, Chief Counsel, Internal Security Sub-Committee of the United States Senate.

Affiant has never met Senator James O. Eastland nor has he had any communication with him directly or indirectly at any time, nor had he ever met Mr. J. G. Sourwine or communicated with him directly or indirectly until October 5, 1963, when the subpoenas of the Senate Internal Security Sub-Committee were served on Mr. Pfister, Mr. Rogers and Colonel Alexander. Neither Senator Eastland nor Mr. Sourwine had anything whatever to do with the aforesaid applications for search warrants and arrest warrants or with the execution of such warrants. Neither of them consulted with affiant in advance of the applications for the warrants or the execution thereof, nor did they participate in any way in the determination by the Louisiana authorities to obtain and execute such warrants.

Affiant specifically states that at no time did he ever agree, plan or act in concert with Senator Eastland or Mr. Sourwine to seize the books, records and papers of the Southern Conference Educational Fund, Inc., and James A. Dombrowski in order that they might thereafter be obtained by the Internal Security Sub-Committee of the

Affidavit of Mrs. Laura Nicholson (Filed as Exhibit 5 to Defendants' Motion)

United States Senate by way of subpoenas of that Committee.

RUSSELL R. WILLIE,
Major, Louisiana State Police

SWORN TO AND SUBSCRIBED before me at Baton Rouge, Louisiana, this 3rd day of January, 1964.

JACK N. ROGERS,
Notary Public

Affidavit of Mrs. Laura Nicholson (Filed as Exhibit 5 to Defendants' Motion)

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE } SS.:

BEFORE ME, the undersigned authority, personally came and appeared: Mrs. Laura Nicholson, who, having been duly sworn, did depose and say: I am an employee of the Joint Legislative Committee on Un-American Activities of the Louisiana State Legislature, and more particularly, employed as secretary to Colonel Frederick B. Alexander, Jr., Staff Director of that Committee. I have been so employed since December 1, 1962. My office address is Room 214, Old State Capitol Building, Baton Rouge, Louisiana.

On the afternoon of Saturday, October 5, 1963, our office was officially closed and I was at home when I received a call from Jack N. Rogers, Esq., Counsel to the Joint Legislative Committee on Un-American Activities. Mr. Rogers asked me if I could come down to the office at Room 214, Old State Capitol Building, Baton Rouge, Louisiana, and do some special work, and I said I would. I thereupon went to the office of the Committee, and when I arrived Mr. Rogers and a gentleman who was introduced to me as Mr. J. G. Sourwine were there. Mr. Sourwine produced several

Affidavit of Mrs. Laura Nicholson (Filed as Exhibit 5 to Defendants' Motion)

blank subpoenas bearing the signature of Senator James O. Eastland, Chairman of the Committee on the Judiciary and Sub-Committee on Internal Security, United States Senate. Mr. Sourwine handed me the United States Senate blank subpoenaes bearing Senator James O. Eastland's signature and asked me to fill them in so that they would call for the production of the same records that were covered by subpoenaes of the Joint Legislative Committee on Un-American Activities of the Louisiana State Legislature, which subpoenaes I understand had been served upon Major Russell R. Willie of the Louisiana State Police on the preceding day, October 4, 1963. Mr. Sourwine dictated the names of the individuals to whom his subpoenaes were to be directed and the other words that were to be filled in on the United States Senate subpoenaes down to the description of the records which were to be covered by those subpoenaes. He thereupon told me to take these descriptions from the subpoenaes of the Louisiana State Committee dated October 4, 1963. This I did. I also filled in the date at the bottom of each Senate subpoena. I typed the date as the "4th day of October," 1963, taking this date also from the date of the Louisiana State subpoenaes. Although I inserted the date in the Senate subpoenaes as the "4th day of October," 1963, the fact of the matter is that I typed these subpoenaes, including the dates thereon, on Saturday, the 5th day of October, 1963. On that same occasion I also typed several letters from Mr. Sourwine to Colonel Tom Burbank, Commanding Officer of the Louisiana State Police. These letters related to the arrangement whereby Colonel Burbank was to act for the United States Senate Committee as custodian of the records covered by that Committee's subpoenaes. These letters were all dated October 5, 1963, the date when they were typed. These letters referred to the Senate Committee's subpoenaes of

"October 4, 1963," but here again those subpoenaes were in fact typed by me on October 5, 1963.

MRS. LAURA NICHOLSON.

SWORN to and subscribed before me at Baton Rouge, Louisiana, this 3rd day of January, 1964.

JACK N. ROGERS,
Notary Public.

Statement of Material Facts Pursuant to Local Rule 9(h)

The material facts involved in this action are set forth in the affidavits filed as part of this motion. For purposes of the motion, the material facts will be summarized in paragraphs 3, *et seq.* hereof.

1. Plaintiff James A. Dombrowski is a resident of the State of Louisiana and a citizen of the United States.[1]

2. Plaintiff Southern Conference Educational Fund, Inc. is a corporation which maintains an office for business purposes in the State of Louisiana.[2] A report of the Senate Internal Security Subcommittee published in 1955 disclosed that the Southern Conference Educational Fund, Inc. was the successor to the Southern Conference for Human Welfare, a communist-front organization.

3. The defendant James O. Eastland is a United States Senator from Mississippi and Chairman of the Committee

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[1] Complaint, p. 1.

[2] Complaint, p. 1.

on the Judiciary of the United States Senate and of the Subcommittee on Internal Security.[3]

4. The defendant J. G. Sourwine is Chief Counsel of the Subcommittee on Internal Security of the Committee on the Judiciary of the United States Senate.[4]

5. The other persons and parties named as defendants in this cause have not been served with process within the District of Columbia and therefore are not within the jurisdiction of this Court.[5]

6. James H. Pfister is a member of the House of Representatives of the Legislature of the State of Louisiana and has been Chairman of the Joint Legislative Committee on Un-American Activities for the State of Louisiana.[6]

7. The Joint Legislative Committee on Un-American Activities, which shall hereinafter be referred to as the "Joint Committee," was constituted by House Concurrent Resolution No. 13 of the 1960 Legislature. This resolution was unanimously adopted by the House of Representatives and by the Senate of Louisiana and was approved by Governor Jimmie H. Davis in July, 1960.[7]

8. House Concurrent Resolution No. 13,[8] requires, inter alia, that the Joint Committee "shall study, investigate and

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[3] Exhibit 6, p. 1.

[4] Exhibit 7, p. 1.

[5] Court record.

[6] Exhibit 1, pp. 1 and 2.

[7] Exhibit 1, p. 1.

[8] A copy of this resolution is Exhibit A to the affidavit of Representative Pfister.

analyze all facts relating directly or indirectly * * * to the activities of groups and organizations which have as their objectives, or as part of their objectives, the overthrow of the State of Louisiana, or of the United States by force, violence or other unlawful means; to all organizations known to be or suspected of being dominated or controlled by a power seeking to impose a foreign political theory upon the government and people of the United States; to all persons who belong to or are affiliated with such groups or organizations; * * *."

9. The Resolution, which recognizes the necessity and desirability of legislation to meet the foregoing problems, also authorized the Joint Committee to co-operate with local law enforcement authorities and similar committees of other States and of the Federal Government.[9]

10. Jack N. Rogers became counsel for the Joint Committee in March of 1961 and both he and Representative Pfister have served with the Joint Committee in their respective capacities from the date of entering into their respective offices continuously up to and including the date of the filing of this motion.[10]

11. Some time during 1962 the Joint Committee became interested in the activities of the Southern Conference Educational Fund, Inc. This organization, which hereinafter shall be referred to as SCEF, was at that time and is now located at 822 Perdido Street, New Orleans, Louisiana.[11]

12. The Joint Committee's interest in SCEF arose out of the fact that the Committee knew of the report published

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[9] *Id.;* fourth Whereas clause; paragraph (c) and paragraph (d).

[10] Exhibit 2, p. 1; Exhibit 1, p. 2.

[11] Exhibit 1, p. 2; Exhibit 2, p. 3.

in 1955 by the Internal Security Subcommittee of the United States Senate in which SCEF was found to be a communist front.[12]

13. In carrying out its legislative responsibilities, the Joint Committee instructed its Staff Director, Colonel Frederick B. Alexander and its Committee Counsel, Jack N. Rogers, to have the Committee staff conduct an investigation of SCEF as required by House Concurrent Resolution No. 13.[13]

14. The investigation was undertaken and, as part thereof, Mr. Rogers was authorized by the Joint Committee to go to Washington, D. C. to consult with the Internal Security Subcommittee of the United States Senate in matters bearing upon the mutual responsibilities of the two committees.[14]

15. The investigation conducted by the staff of the Joint Committee prior to October, 1963 disclosed that the direction and control of SCEF and its publication, *The Southern Patriot,* were in the hands of persons who, at various times, had been identified by witnesses under oath as communists. Among such persons were James A. Dombrowski, Executive Director of SCEF; Aubrey Williams, President Emeritus; Carl Braden, Field Organizer, and formerly Field Secretary of SCEF and Editor of *The Southern Patriot;* Ann Braden, Editor of *The Southern Patriot,* and formerly Field Secretary; and William Howard Melish, Eastern Representative of SCEF; and Benjamin E. Smith, Treasurer of SCEF, who was also a national

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[12] Exhibit 1, p. 2; Exhibit 2, p. 3; also see Exhibit 7, pp. 2 and 3.

[13] Exhibit 1, p. 2; Exhibit 2, p. 3.

[14] Exhibit 1, p. 2; Exhibit 2, p. 3.

board member of the National Lawyers Guild, an identified communist-front organization.[15]

16. During the course of the Joint Committee investigation, Mr. Rogers requested the Internal Security Subcommittee of the United States Senate to furnish him with such information as that Subcommittee could properly give relating to SCEF. This request was made by Mr. Rogers of Mr. J. G. Sourwine, counsel of the Senate Subcommittee, on or about July 17, 1963. In response to the request, Mr. Sourwine furnished Mr. Rogers certain relevant information from the public records of the Subcommittee bearing upon the activities of SCEF.[16]

17. At that time, Mr. Rogers advised Mr. Sourwine that at some future date the Joint Committee of the Louisiana Legislature might subpoena the records of SCEF, and if this were done, any material uncovered relating to the responsibilities of the Senate Internal Security Subcommittee would be brought to the attention of Mr. Sourwine.[17]

18. At a later date, some time about the middle of September, 1963, Mr. Rogers telephoned Mr. Sourwine to inquire regarding whether he and Mr. Ben Mandel, Research Director of the Senate Committee, could possibly come to Louisiana to help evaluate the material contained in the records of SCEF in the event the Joint Committee of the Louisiana Legislature subpoenaed such records.[18]

19. Mr. Sourwine discussed the inquiry made by Mr. Rogers with Senator Eastland who advised Mr. Sourwine

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[15] Exhibit 2, p. 3.

[16] Exhibit 2, p. 3; Exhibit 7, p. 3.

[17] Exhibit 2, p. 3; Exhibit 7, p. 3.

[18] Exhibit 2, pp. 3 and 4; Exhibit 7, p. 3.

that his judgment would have to be based upon what was found in the records; that if they should appear to be within the scope of the investigative authority of the Senate Committee, then he and Mr. Mandel might go to Louisiana to look at them. Senator Eastland emphasized to Mr. Sourwine that the Senate Committee had no interest in any debates or activities in which SCEF might have engaged with respect to civil rights or racial matters; that the Committee was interested only in material relating to communist or communist-front activities, especially communist infiltration of mass organizations and the financing of communist fronts.[19]

20. The investigative inquiry carried out by the Joint Committee staff included, among other things, an examination of the files of the Louisiana State Police authorities and other Louisiana police agencies relating to the activities and programs of SCEF.[20]

21. In September, 1963, after the Joint Committee investigation had been substantially carried forward, Colonel Alexander and Mr. Rogers informed the Joint Committee of the facts known to them relating to SCEF uncovered by the staff investigation up to that point. Mr. Rogers expressed to the Joint Committee his opinion that the operations and activities of SCEF were in violation of the Louisiana criminal statutes relating to subversive activities.[21]

22. The Joint Committee concurred in this opinion and instructed Mr. Rogers and Colonel Alexander to take the

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[19] Exhibit 7, pp. 3 and 4.

[20] Exhibit 2, p. 4.

[21] Exhibit 2, p. 4; Exhibit 1, p. 2.

SCEF matter up with the Louisiana State Police authorities.[22]

23. Pursuant to the directions of the Joint Committee, Mr. Rogers contacted Colonel Thomas D. Burbank, Superintendent, Louisiana State Police, on or about September 20, 1963. The facts relating to SCEF known to the Joint Committee were presented to Colonel Burbank with the request that he have the State Police obtain and execute search warrants for the offices of SCEF and the residential premises occupied by James A. Dombrowski and certain other officers of SCEF.[23]

24. Colonel Burbank agreed to take action and designated Major Russell R. Willie to be the officer in charge of the matter. Major Willie is a Louisiana State Police Officer whose primary duty at that time was and still is, Supervisor of the Bureau of Identification of the State Police. Among the functions performed by his Bureau are the maintenance of finger print records, the receipt and classification of all material dealing with known and suspected subversive organizations as well as individuals known to belong to or associate with said organizations. In addition, pursuant to the provisions of Louisiana State law, all communists in the State of Louisiana and all individuals there who are knowingly members of a communist-front organization as defined in the Louisiana statutes, are required to register with the Department of Public Safety, which is under Major Willie's immediate supervision.[24]

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[22] Exhibit 1, p. 2; Exhibit 2, p. 4.

[23] Exhibit 2, p. 4; Exhibit 3, pp. 1 and 2.

[24] Exhibit 2, p. 4; Exhibit 3, p. 2; Exhibit 4, pp. 1 and 2.

Statement of Material Facts Pursuant to Local Rule 9(h)

25. During his conversation with Colonel Burbank, Mr. Rogers offered to assist the Louisiana State Police in obtaining warrants and his offer was accepted.[25]

26. On October 2, 1963, Major Willie and Mr. Rogers appeared before the Honorable Thomas M. Brahney, Jr., Judge, Criminal District Court, Parish of Orleans where Major Willie swore to applications for search warrants for the offices of SCEF and the residences of James A. Dombrowski, Benjamin E. Smith and Bruce C. Waltzer, all of whom were active in the control of SCEF. At the same time, Major Willie and Mr. Rogers, together, swore to applications for arrest warrants for the three named individuals.[26]

27. Being satisfied that probable cause existed, Judge Brahney signed and issued the aforementioned warrants.[27]

28. The warrants were executed on October 4, 1963 by Louisiana State Police and New Orleans Police, all of whom were under the direction and supervision of Major Willie. The materials described in the search warrants were seized and the three individuals named in the arrest warrants, one of whom was James A. Dombrowski, were arrested. Execution of the warrants was accomplished pursuant to the orders set forth in the warrants.[28]

29. After the warrants had been executed, Mr. Rogers promptly made a preliminary examination of the material

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[25] Exhibit 2, p. 4; Exhibit 4, p. 2.

[26] Exhibit 2, p. 4; Exhibit 4, p. 2.

[27] Exhibit 2, p. 4; Exhibit 4, p. 2.

[28] Exhibit 2, p. 4; Exhibit 3, p. 2; Exhibit 4, pp. 2 and 3.

and records seized by the Louisiana State Police and New Orleans Police.[29]

30. After his examination, Rogers communicated with Representative Pfister, Chairman of the Joint Committee of the Louisiana Legislature, and in response to Rogers' request, Mr. Pfister went to the New Orleans Police Academy, New Orleans, Louisiana, where he met and talked with Rogers.[30]

31. Rogers informed Pfister of the seizure by the police authorities of the books, records and documents of SCEF and of the nature of some of the documents. Representative Pfister, as Chairman of the Joint Committee of the Louisiana Legislature, thereupon authorized Rogers to serve a Joint Committee subpoena upon the appropriate police authority to require the production before the Joint Committee of all the books, records and documents seized from SCEF.[31]

32. Pursuant to the authority given to him by Chairman Pfister, Rogers served a subpoena duces tecum upon Major Willie of the Louisiana State Police, requiring the forthwith production before the Joint Committee of all of the material seized from SCEF.[32]

33. Thereupon, Major Willie, in response to the subpoena, transported the seized material to Baton Rouge, Louisiana where it was retained by the State Police as custodians for the Joint Committee.[33]

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[29] Exhibit 2, p. 5.

[30] Exhibit 1, pp. 2 and 3.

[31] Exhibit 1, pp. 2 and 3.

[32] Exhibit 2, p. 5; Exhibit 4, p. 3.

[33] Exhibit 4, p. 3; Exhibit 2, p. 5; Exhibit 3, p. 3.

Statement of Material Facts Pursuant to Local Rule 9(h)

34. That evening, to wit—October 4, 1963, at about 10:30 P. M., Mr. Rogers telephoned Mr. Sourwine at his home in the metropolitan area of the District of Columbia and informed Sourwine that the SCEF material then under subpoena to the Joint Committee would be of great interest to the Internal Security Subcommittee. Rogers urged that Mr. Sourwine and Mr. Mandel come to Baton Rouge, Louisiana for the purposes of assisting in the evaluation of the seized material as soon as possible. Mr. Sourwine advised Mr. Rogers that he and Mr. Mandel would try to be in Baton Rouge the following day, October 5, 1963.[34]

35. On the following morning, Mr. Mandel and Mr. Sourwine left the District of Columbia area and flew to New Orleans, Louisiana and then drove to Baton Rouge, Louisiana where they met Mr. Rogers.[35]

36. Rogers and Colonel Alexander informed Sourwine of the nature of the documents which had been secured from SCEF and the content of certain particular documents whereupon Mr. Sourwine concluded that the records of SCEF in possession of the Joint Committee included a substantial quantity of material which would be of interest to the Internal Security Subcommittee of the United States Senate in pursuance of its investigative functions within the limits of the directive which had been given him by Senator Eastland.[36]

37. Mr. Sourwine thereupon telephoned Senator Eastland, reported his conclusion to the Senator and recommended that all the material obtained by the Joint Com-

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[34] Exhibit 2, p. 5; Exhibit 7, p. 4.

[35] Exhibit 2, p. 5; Exhibit 7, p. 4.

[36] Exhibit 7, p. 4.

mittee be subpoenaed from that committee by the Senate Internal Security Subcommittee. Senator Eastland authorized Mr. Sourwine to issue subpoenas for the material and thereafter, on the same day, October 5, 1963, Sourwine served subpoenas duces tecum upon Chairman Pfister, Mr. Rogers and Colonel Alexander, all of the Joint Committee, calling for the production of all the material seized from SCEF.[37]

38. Upon service of the subpoena duces tecum of the Senate Internal Security Subcommittee on October 5, 1963, Mr. Sourwine took possession, on behalf of the Subcommittee, of all the SCEF material then in the hands of the Joint Committee of the Louisiana Legislature.[38]

39. Sourwine then arranged with Colonel Thomas D. Burbank to hold this material as custodian for the Senate Subcommittee.[39]

40. Pending transportation of the SCEF material to Washington, D. C., access to the material was allowed to the Joint Committee.[40]

41. Subsequently, two staff members of the Internal Security Subcommittee brought the material to the Subcommittee's office in Washington, D. C. where, pursuant to the resolution adopted by the Subcommittee on Internal Security of the United States Senate on November 14, 1963, a copy of which resolution is attached to Senator

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[37] Exhibit 7, pp. 4 and 5; Exhibit 6, p. 2; Exhibit 4, pp. 3 and 4; Exhibit 3, p. 3; Exhibit 2, p. 5; Exhibit 1, p. 3.

[38] Exhibit 7, p. 5.

[39] Exhibit 2, p. 5; Exhibit 3, p. 3; Exhibit 7, p. 5.

[40] Exhibit 1, p. 3; Exhibit 2, p. 5.

Eastland's affidavit, a process of evaluating the material was undertaken.[41]

42. On November 8, 1963, the Joint Committee of the Louisiana Legislature held hearings involving SCEF at which time copies of many of the documents seized from SCEF were introduced into evidence. Upon the basis of the evidence produced, the Joint Committee resolved as a legislative finding that SCEF was a communist front and a subversive organization aiding and abetting the communist conspiracy.[42]

43. Neither Senator James O. Eastland nor Mr. J. G. Sourwine had anything whatsoever to do with the acquisition of the SCEF material by the Joint Committee of the Louisiana Legislature or with the preparation, issuance or execution of the arrest and search warrants whereunder the Louisiana authorities obtained the material of SCEF which was later subpoenaed by the Senate Internal Security Subcommittee.[43]

44. Otherwise than stated in this Statement of Material Facts and the exhibits hereto, neither Senator Eastland nor Mr. Sourwine had anything to do with the activities of the Louisiana authorities, be they legislative or executive, insofar as such activities related to James A. Dombrowski or SCEF, or had any knowledge of such activities.[44]

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[41] Exhibit 7, p. 5; Exhibit 6, p. 1 and exhibit thereto.

[42] Exhibit 1, p. 3; Exhibit 2, pp. 5 and 6.

[43] Exhibit 7, pp. 6 and 7; Exhibit 6, p. 2; Exhibit 4, p. 4; Exhibit 3, p. 4; Exhibit 2, p. 6; Exhibit 1, p. 3.

[44] See all exhibits.

Excerpts from Deposition of Walter E. Dillon, Jr.

45. At all times pertinent hereto, Senator James O. Eastland and Mr. J. G. Sourwine acted in their official capacities as officers of the United States Government.[45]

/s/ David C. Acheson,
DAVID C. ACHESON,
United States Attorney.
/s/ Joseph M. Hannon,
JOSEPH M. HANNON,
Assistant United States Attorney.

ROGER ROBB,
of Counsel.

Excerpts from Deposition of Walter E. Dillon, Jr.

[3] Q. Now would you give us your full name, Mr. Dillon, for the record? A. Walter E. Dillon, Junior.

Q. And your address, please, sir? A. 1625 I Street, Northwest, Washington 6, D. C.

Q. And you are a lawyer, a member of the Bar of the District? A. Yes.

Q. You are of counsel for the plaintiffs in this case? A. Yes.

Q. And are you the same Mr. Walter E. Dillon, Jr., who signed and swore to the complaint in this case? A. Yes.

Q. Your affidavit reads as follows:

District of Columbia, ss: Walter E. Dillon, Jr., being duly sworn, says that he has read the foregoing complaint by him subscribed, that he knows the contents thereof, and that the matters and things therein stated he verily [4] believes to be true.

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[45] Deposition of J. G. Sourwine, p. 77 and Exhibits 6 and 7.

Excerpts from Deposition of Walter E. Dillon, Jr.

Subscribed and sworn to before me this 31st day of October, 1963.

And a signature which is—which I cannot read, and Notary Public.

That was the affirmation to which you subscribed? A. Yes.

Q. Now, did you mean by that, Mr. Dillon, that you had no personal knowledge of the matters and things which are stated in the complaint? A. I meant what it says.

Q. Well, do you or did you have any personal knowledge of the matters and things stated in the complaint?

Mr. Kinoy: I think, Mr. Robb, I am going to object to that question.

I fail to see the total relevancy of the interrogation.

Mr. Dillon, the record shows, is one of the attorneys of record in this matter. He verified this pleading pursuant to Rule 6 of the Rules of Civil Procedure of the District of Columbia, perfectly proper verification. It is obvious that any information whatsoever with respect to the four corners of this complaint, the issue involved here, come to Mr. [5] Dillon as an attorney in this matter, and it would appear to me to be totally improper and in violation of the relationship between attorney and counsel to interrogate him at this point as to any of the facts whatsoever which come to his knowledge as an attorney in this case.

I think that any information which you would attempt to receive pursuant to this question would be not admissible and would be very improper.

Mr. Robb: This is a deposition for the purpose of discovery, Mr. Kinoy.

I'm asking Mr. Dillon whether or not he based this affidavit upon information he had received and

Excerpts from Deposition of Walter E. Dillon, Jr.

whether it was made as of his personal knowledge.

Mr. Kinoy: Well, I have made my objection very clear and it's up to Mr. Dillon who is an attorney to make his own decision as to whether he should answer the question.

The Witness: I'll answer the question.

Let me answer it this way. The information contained in that complaint came to me from three sources, actually four sources; primarily through the law offices of Kunstler, Kunstler and Kinoy, of which Mr. Kinoy here is a member.

I received a call from William Kunstler, an [6] attorney known by me and with whom I have worked closely for many years on other cases, and he related to me many of the facts contained in the complaint.

Mr. Kinoy, I believe—I believe it was a conference call or both of them were on the phone in the offices of Kunstler, Kunstler and Kinoy.

By Mr. Robb:

Q. That's in New York, Mr. Dillon? A. Pardon?

Q. That's in New York? I say it's in New York? A. That's in New York City.

And I also received two affidavits, one which is part of the record in the case, one from Mr. Dombrowski and one from Mr. Brener.

And on the basis of that I verified—I stated an opinion that I believed the facts to be true.

Q. And those were the three sources? A. Four sources.

Q. Four sources. Four? A. William Kunstler, Kunstler and Kinoy—

Q. I get it. There were no others, is that correct? A. Mr. Brener and Mr. Dombrowski.

* * *

BRIEF FOR APPELLANTS

United States Court of Appeals

For the District of Columbia Circuit

Nos. 18435, 18544

JAMES A. DOMBROWSKI and SOUTHERN CONFERENCE EDUCATIONAL FUND, INC.,

Appellants,

against

COLONEL THOMAS D. BURBANK, individually and as Commanding Officer of the Division of Louisiana State Police, RUSSELL R. WILLIE, individually and as Major of the Louisiana State Police Department, JAMES H. PFISTER, individually and as Chairman of the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature, SENATOR JAMES EASTLAND, individually and as Chairman of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate, J. G. SOURWINE, individually and as Committee counsel for the Internal Security Subcommittee of the Judiciary Committee of the United States Senate, the CITY OF NEW ORLEANS and ALLSTATE INSURANCE CO.,

Appellees.

Appeal From the United States District Court for the District of Columbia

WILLIAM M. KUNSTLER,
MICHAEL J. KUNSTLER,
ARTHUR KINOY,
511 Fifth Avenue,
New York, New York,

MILTON E. BRENER,
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ARTHUR KINOY,
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of Counsel

Statement of Questions Presented

These consolidated appeals are from an order of the District Court granting summary judgment to defendants in an action seeking money damages brought under the Federal Civil Rights Acts and an order of the District Court dismissing the cause of action for equitable relief in the same complaint. These appeals present the following questions:

1. Whether the appellees, who were sued for damages under the Civil Rights Act and the Constitution for participating in a conspiracy under color of the laws of the State of Louisiana to deprive the appellants, a civil rights organization and its officers, of federally protected rights, were protected from such a suit by the concept of legislative immunity?

2. Whether summary judgment should have been granted in an action for damages under the Civil Rights Act and the Constitution when the pleadings, depositions and affidavits on file reveal the existence of genuine issues of fact as to (a) whether the actions of the appellees were authorized by the legislature and were sufficiently within the scope of official business so as to come within the boundaries of the concept of legislative immunity and (b) whether a conspiracy existed under color of Louisiana state laws to deprive appellants of federally protected rights, and (c) whether these appellees participated in this conspiracy?

3. Whether the District Court abused its discretion under Rule 56, subdivision (f) of the Federal Rules of Civil Procedure when it refused the application for a continuance to permit affidavits to be obtained or depositions to be taken relating to additional newly discovered facts further revealing a total lack of legislative authorization for the wrongful actions of appellees?

4. Whether the complaint stated a cause of action for equitable relief under the Civil Rights Act and the Con-

stitution when it charged that the appellees participated with other individuals and officials of the State of Louisiana in a plan and conspiracy, under color of laws of the State of Louisiana, to seize documents, files, membership lists and lists of contributors of an association of American citizens engaged in peaceful activities seeking equal rights for Negro citizens in the states of the South, which seizures violated the appellants' federally protected rights under the First, Fourth and Fourteenth Amendments to the constitution of the United States?

5. Whether it was an abuse of discretion for the District Court to deny appellants the right to withdraw their own motion for temporary relief in order to take a deposition of one of the appellees, which deposition would have revealed total absence of legislative authorization for the acts complained of in the complaint?

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IN THE

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Appellants,

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Appellees.

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The District Court had jurisdiction over the complaint herein under the Constitution of the United States and in particular the First, Fourth and Fourteenth Amendments thereof, and under the Laws of the United States and in particular Title 28 U. S. C. 1331(a); 1343(3), (4); and Title 42 U. S. C. 1983 and 1985. At a hearing on appellants' application for temporary relief the District Court dismissed the portions of the complaint which sought injunc-

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tive relief. A notice of appeal was duly filed from this dismissal. After the taking of certain depositions pursuant to the Federal Rules of Civil Procedure by both appellants and appellees, appellees moved to dismiss the complaint for failure to state a complaint upon which relief can be granted, or, in the alternative for summary judgment. Affidavits were filed in support and in opposition to the motion. The District Court after argument granted appellees' motion for summary judgment. Appellants duly filed a notice of appeal from this order. The two appeals have been consolidated by subsequent order of this Court. This Court has jurisdiction under 28 U. S. C. Section 1291.

Statement of the Case

A. Statement of Facts Preceding the Institution of the Present Complaint

Appellant, Southern Conference Educational Fund, Inc., hereafter referred to as "SCEF", is a non-profit membership corporation organized under the laws of the State of Tennessee and maintains an office in the State of Louisiana (1a). The purpose and function of SCEF as an association is to attempt to secure to Negro citizens the rights guaranteed to them under the federal Constitution and to participate in efforts to end all forms of segregation in the Southern states (1a). The appellant, Dr. James A. Dombrowski, is the Executive Director of SCEF and is a citizen of the State of Louisiana and the United States (1a, 20a).

On the afternoon of October 4, 1963, certain police officers of the Police Department of the City of New Orleans, Louisiana, together with officers of the State Police and representatives of the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature, broke into and forcibly entered the office of SCEF in the City of New Orleans and proceeded to seize the entire contents of

the office including the books and records of the organization, its ledgers, receipts, memoranda, membership lists, lists of contributors, vouchers, pamphlets and literature, together with many items of personal property belonging to Dr. Dombrowski. The office was totally ransacked and everything movable taken out (3a, 20a through 25a). Dr. Dombrowski was placed under arrest and booked for violation of Louisiana Revised Statutes 14:358 et seq. and 14:390 et seq., known as the Louisiana Anti-Subversive Laws (19a).*

The same day officers of the New Orleans Police Department and of the State Police, together with representatives of the Louisiana Joint Legislative Committee, proceeded to search the residence of Dr. Dombrowski in the City of New Orleans and seized many items of personal property from his house and from his automobile located nearby (21a).

The raids of October 4 and the arrest of Dr. Dombrowski were conducted purportedly under the authority of search warrants and arrest warrants issued on October 2nd by a Judge of the Criminal District Court of the Parish of Orleans. No affidavit or other criminal proceedings were ever instituted against either appellant SCEF or appellant Dombrowski but on October 25th, on appellants' motion for a preliminary hearing, a Judge of the Criminal District Court for the Parish of Orleans, after taking evidence, summarily discharged the appellants holding that there had

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* In *Dombrowski* v. *Pfister*, #14019, Eastern District of Louisiana, Jurisdictional Statement filed, Supreme Court of the United States, the constitutionality of these statutes both on their face and as applied, have been drawn in question. A three-judge District Court was convened. District Judges West and Ellis held that there was no federal jurisdiction to restrain enforcement of the state laws. Circuit Judge Wisdom dissented holding that the court had jurisdiction and that the statutes were both unconstitutional in part and superseded by federal legislation. The case is presently pending on direct appeal to the Supreme Court.

been no probable cause for the issuance of the warrant of arrest (10a).*

The books, records, documents, membership lists and other articles which had been seized during these raids were, however, not returned to the appellants but were, secretly and without the appellants' knowledge, transferred to the possession of the individual appellees in this action. At sometime prior to the raids discussions had been held between one Jack N. Rogers, the counsel to the Louisiana Joint Committee and appellee Sourwine, counsel to the Internal Security Subcommittee of the Judiciary Committee of the Senate. The question of the record and files of SCEF was discussed. (Deposition of Sourwine, p. 21-25) The record facts next show that sometime in the evening of October 4th Rogers telephoned Sourwine informing

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* The raids of October 4th which involved two Louisiana civil rights attorneys as well as appellants are described as follows by Circuit Court Judge Wisdom in his opinion in *Dombrowski* v. *Pfister,* discussed in footnote, p. 3, *supra.*

> "The intervenors, two practicing lawyers in New Orleans, have been active in civil rights cases, representing Negroes in many desegregation cases and representing the American Civil Liberties Union in all sorts of cases. They were arrested. At gunpoint their homes and offices were raided and ransacked by police officers and trustees from the House of Detention acting under the direct supervision of the staff director and the counsel for the State Un-American Activities Committee. The home and office of the director of Southern Conference Educational Fund were also raided. Among the dangerous articles removed was Thoreau's Journal. A truckload of files, membership lists, subscription lists to SCEF's newspaper, correspondence, and records were removed from SCEF's office, destroying its capacity to function. At the time of the arrests, Mr. Pfister, Chairman of the Committee, announced to the press that the raids and arrests resulted from 'racial agitation'. An able, experienced, and independent-minded district judge of the Criminal District Court for the Parish of Orleans, after hearing evidence, discharged the plaintiffs from arrest on grounds that the arrest warrants were improvidently issued and that there was no reasonable cause for the arrests".

him that the Louisiana Committee had obtained all the records, files, membership lists and other materials belonging to SCEF (Deposition of Sourwine, p. 32). Sourwine appeared in Baton Rouge, Louisiana the morning of the 5th (Deposition of Sourwine, p. 35). He had in his possession blank subpoenas signed by appellee Eastland, the chairman of the Internal Security Subcommittee of the Senate. These subpoenas, according to appellee Sourwine's testimony, were served on Rogers that morning, although the subpoenas on their face were dated October 4th, the day of the raids (35a, 36a). Appellees maintained this was a "stenographic error" (35a, 36a) . The Superintendent of the Louisiana Police was appointed on the same day "custodian" of these records and documents for appellees Sourwine and Eastland. However, the physical location of the records and other material remained in Baton Rouge (Deposition of Sourwine, p. 45). The issuance of the blank subpoenas dated October 4th, was never authorized by the Internal Subcommittee of the United States Senate. Appellee Sourwine testified on deposition that these subpoenas were never authorized by the Committee or the Subcommittee (35a, 36a).

Immediately after the ruling of the Criminal District Court for the Parish of Orleans that the warrant under which the arrests of October 4th were conducted were illegal and un-supported by valid affidavits of probable cause, the appellants instituted in the United States District Court for the Eastern District of Louisiana, New Orleans Division, a federal plenary action under the Civil Rights Act and the Constitution, seeking injunctive relief and money damages. This action is referred to hereafter as the companion action.*

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* The companion action is *Dombrowski* v. *Burbank*, #13,967 in the District Court for the Eastern District of Louisiana, New Orleans Division.

The appellants joined, as defendants in the companion action, the Louisiana individuals involved in the raids together with appellee Eastland,* charging a conspiracy under the color of Louisiana law to deprive the appellants of rights privileges and immunities granted to them as citizens of the United States by the laws and Constitution of the United States (7a). The complaint was filed on Sunday morning, October 27th. A motion for a temporary restraining order restraining the defendants from removing any of the seized documents, records and other articles from their location in Baton Rouge, and from delivering them, or surrendering them in any way to appellee Eastland, was presented to Federal District Judge Ainsworth of the Eastern District of Louisiana (29a). Judge Ainsworth directed that the motion be returnable before him Monday morning, October 28th and ordered the appellants to notify the defendants that the restraining order would be heard in the District Court that Monday morning (29a). The appellants notified appellee Eastland by telegram (29a).

The testimony reveals that on Sunday, October 28th, appellee Eastland notified appellee Sourwine by telephone of the receipt of this telegram (Sourwine deposition, p. 52). Appellee Sourwine was then directed by appellee Eastland to telephone Baton Rouge and arrange to have all of the records, documents, membership lists and other material transferred that night out of the State of Louisiana (Sourwine deposition p. 55). At about midnight Sunday night, a vanload of material containing these records was transferred over the state border to Woodville, Mississippi (29a). On Monday morning, October 28th, attorneys for the Louisiana defendants informed the Federal District Court that the records and material seized in the raid, the subject of the temporary restraining order, were no

* Service was never effected upon appellee Eastland in the companion Louisiana action.

longer in the jurisdiction of the Federal District Court for the Eastern District of Louisiana and that the matter was therefore moot (29a).

Immediately thereafter appellants filed the present complaint in the United States District Court for the District of Columbia, the residence of appellees Sourwine and Eastland.

B. The Present Complaint

The instant complaint (1a-11a) paralleled almost identically the basic allegations of the complaint filed on October 27th in the Eastern District of Louisiana in the companion action. The instant complaint alleged that the defendants Thomas D. Burbank, Russell R. Willie, James H. Pfister, Senator James O. Eastland and J. G. Sourwine entered into a plan, agreement and conspiracy, under the color of state laws and statutes, to deprive the plaintiffs of rights, privileges and immunities granted to them as citizens of the United States under the laws and Constitution of the United States. The complaint alleged that pursuant to this conspiracy the defendants, under the color of certain Louisiana state statutes, planned and carried through raids of the plaintiffs' homes and offices, as well as causing the arrest of the plaintiffs, all in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States.

The complaint further alleged that the defendants conspired, under the color of the state statutes, to seize books, records, lists of members, contributors and friends of the plaintiffs who are engaged in efforts in the states of the South to implement the Equal Protection Clause of the Fourteenth Amendment. The complaint alleged that these activities of the defendants was for the purpose of harassing, intimidating and deterring the plaintiffs, their friends, members and supporters from exercising federally-protected constitutional rights. The complaint further alleged

that the actions of the defendants, under color of the Louisiana state statutes, has resulted in serious damage to the plaintiffs.

The complaint sought money damages in the amount of $250,000 for each plaintiff as well as injunctive relief.

C. The Proceedings Below

After the filing and serving of the complaint upon those defendants who were Washington residents, appellees Eastland and Sourwine,* a motion for a preliminary injunction came before the District Court for the District of Columbia on December 18th. Although appellants sought to withdraw the motion in order to take a deposition of appellees in support of the request the District Court, by Judge Holtzoff, entered an order from the bench dismissing so much of the plaintiffs' complaint as sought injunctive relief against the defendants (12a-14a). Judge Holtzoff delivered an oral opinion in support of his conclusions that the granting of injunctive relief would "contravene the constitutional requirement of separation of powers and would exceed the jurisdiction of this Court" (12a). Notice of appeal was duly filed from this order. The order of Judge Holtzoff left undisturbed so much of the complaint which set forth a cause of action for money damages against the appellees.

Pursuant to the Federal Rules of Civil Procedure a deposition of appellee Sourwine was taken by appellants. Subsequent to this, a deposition of Walter Dillon, Esq., one of the attorneys for the appellants, was taken by the appellees. Both of these depositions are part of the files of the case. A portion of the deposition of appellee Sourwine is printed as part of the Joint Appendix (36a, 37a). Immediately subsequent to the taking of these depositions, appellees moved to dismiss the complaint or, in the alterna-

* Service was never effected on the Louisiana defendants.

tive for summary judgment (15a). Identical motions were made in the companion action in the Federal District Court in Louisiana by the Louisiana defendants. Affidavits were filed in support of the motion and in opposition. Subsequent to the filing of these affidavits but prior to the hearing on appellee's motion, appellants filed affidavits of counsel seeking to invoke Rule 56 Subdivision (f) of the Federal Rules of Civil Procedure which would permit the Court on a motion for summary judgment to grant a continuance "to permit affidavits to be obtained or depositions to be taken or discovery to be had" (30a-35a). These affidavits of counsel set forth serious questions of fact which were discovered after appellees' motion, which indicated the existence of additional serious and sharply disputed material issue of facts which would require the denial of a motion for summary judgment. The contents of these affidavits are discussed more fully in Point I, *infra*.

On March 12, 1964, the District Court, by Judge Sirica, refused to grant the application for a continuance pursuant to Rule 56 Subdivision (f) and granted the motion for summary judgment in respect to the cause of action for damages (17a). No opinion was filed. A notice of appeal was duly filed from the order granting summary judgment (17a). A subsequent order of this Court consolidated the appeals from the order dismissing the complaint insofar as it prayed for injunctive relief and the order granting summary judgment on the cause of action for damages.

On April 20, 1964, in the companion action in the United States District Court for the Eastern District of Louisiana, Federal Judge Ainsworth entered orders denying identical motions for summary judgment of James Pfister, the Chairman of the Louisiana Joint Legislative Committee and Russell Willie, a member of the Louisiana State Police Department. The motion of Thomas Burbank, the Superintendent of the State Police, for summary judgment, was granted.

The motion to dismiss, and, in the alternative for summary judgment, of James Pfister, Chairman of the Louisiana Legislative Committee is identical in all respects to the motion made by the appellees here. The decision of the United States District Court for the Eastern District of Louisiana denying the motion for summary judgment is directly contrary to the decision of the District Court for the District of Columbia in granting appellees' motion for summary judgment. A clear conflict between these District Courts seems to be presented.

Constitutional Provisions, Statutes and Rules Involved

The Constitutional provisions involved are the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States. The statutes involved are primarily Title 42 U. S. C. 1983 and 1985. The rules involved are primarily Rule 56 of the Federal Rules of Civil Procedure.

Statement of Points

1. The District Court erred in granting appellees' motion for summary judgment in respect to the cause of action for money damages under the Civil Rights Act and the Constitution.

2. The District Court erred in denying appellants' application for a continuance under Rule 56, subdivision (f) of the Federal Rules of Civil Procedure in order to permit additional affidavits to be obtained or depositions to be taken.

3. The District Court erred in dismissing the cause of action for equitable relief under the Civil Rights Act and the Constitution.

4. The District Court erred in refusing to permit appellants to withdraw their own motion for temporary relief in order to take a deposition of appellees.

Summary of Argument

I

The granting of summary judgment for appellees was based upon a misconception of the doctrine of legislative immunity. Appellees are not immune from an action for damages under the Civil Rights Act merely because they are legislators or employees of a legislative committee. Legislative immunity applies only to actions within the sphere of legitimate legislative activity. Activities which are unauthorized by the legislature and plainly beyond the scope of official business are not immune from suit. The activities of appellees in participating in a conspiracy or plan under color of Louisiana state law to conduct illegal and unconstitutional searches and seizures in violation of appellants' federally protected rights were unauthorized by the legislature and were plainly beyond the scope of official business.

II

The pleadings, affidavits and depositions on file reveal genuine issues of fact as to whether the actions of appellees were in fact authorized by the legislature and within the scope of official business. The record evidence shows that the purported subpoenas utilized by appellees in an effort to show an official sanction for their actions were never authorized by the Senate Committee or Subcommittee. Under the decision of this Court in *Shelton* v. *United States,* such subpoenas are illegal, invalid and unauthorized. The actions of appellees in relation to the illegal raids conducted pursuant to the charged conspiracy were therefore totally unauthorized by the legislature. In face of appellees' assertion of legislative sanction this raises a serious and material issue of fact requiring the denial of a motion for summary judgment. Furthermore, the refusal of the lower court to grant a continuance to permit affidavits to be obtained or depositions taken pursuant to Rule 56, sub-

division (f) of the Federal Rules of Civil Procedure, in light of serious newly discovered facts tending further to show that appellees' actions were totally unauthorized, was a clear abuse of discretion.

III

The pleadings, affidavits and depositions on file reveal genuine issues of fact as to the existence of a conspiracy under color of Louisiana state laws to deprive appellants of federally protected rights, as well as appellees' participation in such a conspiracy. The facts contained in both the affidavits submitted and the deposition taken of appellee Sourwine are more than sufficient to infer a common plan and purpose and appellees' participation in this common plan and purpose. In face of appellees' denials this raises serious material issues of fact requiring the denial of a motion for summary judgment.

IV

In dismissing the cause of action for equitable relief the lower court totally misconstrued the complaint. The action does not seek injunctive relief against the functioning of a Senate Committee. The invocation of the doctrine of separation of powers is misplaced. The complaint seeks equitable relief against appellees' participation with other individuals in a plan and conspiracy under color of state laws of Louisiana to seize documents, files, membership lists and list of contributors belonging to a civil rights organization seeking equal rights for Negro citizens in states of the South. The complaint fully states a cause of action for equitable relief under the Civil Rights Act and the Constitution. The fact that some of the defendants are connected with the legislature does not oust the federal courts of equitable jurisdiction. Moreover, the complaint on its face does not seek injunctive relief against the legislature or any of its committees.

ARGUMENT

POINT I

It was error for the District Court to grant appellees' motion for summary judgment.

1. The Wrongful Actions of Appellees Are Not Protected by Any Doctrine of Legislative Immunity.

The conclusion of the lower court that "there is no genuine issue as to any material fact" and that consequently summary judgment in respect to the cause of action for money damages should be granted to appellees (17a) is based upon a fundamentally erroneous concept of the doctrine of legislative immunity. The entire theory of appellees in the court below and embraced by the District Court in granting the motion for summary judgment reflects a profound misconception of the doctrine of legislative immunity.

Appellees do not seriously challenge the jurisdiction of the District Court to entertain the cause of action for damages. Jurisdiction is clearly vested under both the Constitution of the United States, *Bell* v. *Hood,* 327 U. S. 678; *Wheeldin* v. *Wheeler,* 373 U. S. 647; *Bock* v. *Perkins,* 139 U. S. 628, as well as under Title 42 U. S. C. 1983, 85 of the Federal Civil Rights Acts, *McNeese* v. *Board of Education,* 373 U. S. 668, *Monroe* v. *Pape,* 365 U. S. 171, *Lee* v. *Hodges,* 321 F. 2d 480 (CA 4, 1963), *Nesmith* v. *Alford,* 318 F. 2d 110 (CA 5, 1963).

Nor do appellees seriously contend that absent considerations of the impact of the doctrine of legislative immunity, the complaint fails to state a cause of action for damages under the Civil Rights Act. *Monroe* v. *Pape, Nesmith* v. *Alford, Lee* v. *Hodges,* all *supra.* See also, *Jordan* v. *Hutcheson,* 323 F. 2d 597 (CA 4, 1963). The

complaint in fact sets out a cause of action for damages under Title 42 U. S. C. 1983 and 1985, identical in essential allegations to that sustained by the Supreme Court in *Monroe*. In essence the complaint alleges, as in *Monroe*, actions taken under color of state laws to effect illegal searches and seizures and false arrests in violation of the Fourth Amendment. Such a complaint adequately sets forth a cause of action under the Civil Rights Act. *Monroe* v. *Pape, supra.**

The main thrust of appellees' position in the court below in respect to the cause of action for money damages was neither an attack upon the jurisdiction of the court nor upon a failure to state a cause of action under the Civil Rights Act. Appellees' principal contention has always been that the doctrine of legislative privilege as judicially developed by the Supreme Court in some manner cloaks the otherwise wrongful acts of appellees with an absolute immunity. This conception, which underlies as well the actions of the District Court rests upon a fundamental misconception of the scope and limitations of the doctrine of legislative immunity.

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* In the court below appellees urged, at one point, that the doctrine of *Monroe* v. *Pape, supra*, cannot be invoked where federal action is involved. This of course completely misconstrues the present complaint. The allegation here is that appellees Eastland and Sourwine participated in a conspiracy *under color of the laws of the State of Louisiana* to violate the Fourth and Fourteenth Amendment rights of appellants. This brings the cause of action directly within the wording of Title 42 U. S. C. 1983, which provides a remedy against "every person who under color of any statute" deprives citizens of rights, privileges and immunities granted to them by the laws and Constitution of the United States. The gravamen of the complaint here is that appellees Eastland and Sourwine, together with the Louisiana individuals, defendants in the companion suit, conspired to utilize *Louisiana law* to effect their conspiracy. Moreover, the complaint clearly states a cause of action under the conspiracy section of the Civil Rights Act, 42 U. S. C. 1985. *Wheeldin* v. *Wheeler, supra*, at p. 649, fn. 2.

a) Appellees rely upon the decision of the Supreme Court in *Tenney* v. *Brandhove,* 341 U. S. 367 (1951) as their principal authority for the proposition that the doctrine of legislative immunity bars appellants from obtaining relief in the present case. An examination of the outer limits of this doctrine as carefully set forth in the opinion of Mr. Justice Frankfurter reveals that the charged activities of appellees Eastland and Sourwine are protected neither by an absolute nor limited immunity.

Throughout this case appellees have proceeded under the assumption that there are no relevant outer bounds to the scope of the doctrine of legislative privilege. But the *Tenney* case reiterates the basic assumption of judicial limitation which underlies the emergence of this concept throughout both English and American judicial history. Neither a legislature, itself, nor individual legislators may establish a legislative privilege merely by asserting one. As Mr. Justice Frankfurter carefully points out:

> "The House of Commons' claim of power to establish the limits of its privilege has been little more than a pretense since *Ashby* v. *White,* 2 Ld. Raym. 983, 3 (3 Id. 320)."

And the Supreme Court of the United States in the tradition of the English courts has never hesitated to delineate the boundaries of any asserted legislative immunity. See *Kilbourn* v. *Thompson,* 103 U. S. 168, *Spalding* v. *Vilas,* 161 U. S. 483.

Justice Frankfurter in *Tenney* sets forth clearly boundaries of the doctrine as understood by the four members of the Court joining in the opinion. The essential question posed by Justice Frankfurter in considering the applicability of the doctrine to any given set of circumstances is whether "it appears that the defendants were acting in the sphere of legitimate legislative activity." *Tenney* v. *Brandhove,* at p. 376. Any legislative immunity, Justice Frankfurter insists in *Tenney,* extends only to

conduct within "the sphere of legitimate legislative activity." And Justice Frankfurter further reiterates that "this Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role." *Tenney* v. *Brandhove*, at p. 377. In applying this definition of legislative immunity to the facts before the Court in *Tenney*, Justice Frankfurter carefully confined the holding of the majority:

> "We conclude only that here the individual defendants and the Legislative Committee were acting in a field where legislators traditionally have power to act, and that the statute of 1871 does not create civil liability for such conduct."
>
> [*Tenney* v. *Brandhove*, at p. 379]

The concurring opinion of Mr. Justice Black, without which there would not have been a Court, sharpens the definition of legislative immunity presented in *Tenney*. Mr. Justice Black emphasizes the outer boundaries of the doctrine:

> "The Court holds that the Civil Rights statutes were not intended to make legislators personally liable for damages to a witness injured by a committee exercising legislative power. This result is reached by reference to the long-standing and wise tradition that legislators are immune from legal responsibility for their intra-legislative statements and activities. The Court's opinion also points out that Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377, held legislative immunity to have some limits. And today's decision indicates that there is a point at which a legislator's conduct so far exceeds the bounds of legislative power that he may be held personally liable in a suit brought under the Civil Rights Act. I substantially agree with the Court's reasoning and its conclusion."

The application of the doctrine of legislative immunity delineated in both Justice Frankfurter's opinion and Justice Black's concurring opinion in *Tenney* compels the

conclusion that the doctrine of legislative immunity is not available to these appellees. The complaint charges conduct on the part of appellees and their co-conspirators which cannot, by the farthest reaches of the imagination, be described as actions within "the sphere of legitimate legislative activity".

Appellees Eastland and Sourwine are charged with conspiring with the Louisiana defendants to use the pretext of Louisiana state laws to raid the offices and homes of the appellants and ransack these premises, seizing material belonging to the appellants, in flagrant violation of the Fourth Amendment to the Constitution of the United States, all for the purpose of intimidating and deterring the appellants from exercising rights guaranteed to them under that Constitution. Such conduct hardly represents "legitimate legislative activity" on the part of the Senate of the United States or representatives of that body.

Mr. Justice Black, in his concurring opinion, bluntly states that "there is a point at which a legislator's conduct so far exceeds the bounds of legislative power that he may be held personally liable in a suit brought under the Civil Rights Act." This case presents such a point. It is difficult to imagine any conduct which could more exceed "the bounds of legislative power". Unless the limitations written into the doctrine of legislative immunity by the majority in *Tenney* are to be utterly disregarded, the cause of action set forth here must be sustained and orders of the lower court reversed.

The stern reminder in *Tenney* of the boundaries of the doctrine of immunity is not a recent innovation. Mr. Justice Frankfurter carefully repeats the warning statement of Mr. Justice Miller in *Kilbourn* v. *Thompson, supra*:

> "It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the

members who take part in the act may be held legally responsible."

[*Kilbourn* v. *Thompson, supra*, at p. 204]

This Court now faces the situation posed by Mr. Justice Miller in *Kilbourn*. The conduct of appellees as charged in the complaint is truly of "an extraordinary character". They are charged with taking part in a plan totally removed from the sphere of legitimate legislative activity of the Senate. No doctrine of legislative immunity can protect appellees from such charges. Otherwise the doctrine becomes nothing but a self-serving assertion of privilege by individual legislators or their agents.

An examination of the actual facts presented to the Court in *Tenney* illustrates most sharply the differentiation between conduct for which legislative immunity may be invoked and situations, as in the instant appeal, in which legislators "may be held personally liable in a suit brought under the Civil Rights Act", *Tenney* at p. 379. The action complained of in *Tenney* was within the scope of legislative power, and the petitioner there did not urge an all embracing absolute privilege but conceded that "We are not pressing the proposition that a judge or legislator acting beyond the power conferred in him has immunity from civil liability." Brief for Petitioner on certiorari—*Tenney* v. *Brandhove, supra*. In *Tenney* the conduct complained of related to an appearance of a witness before a properly constituted legislative committee. The gravamen of the complaint was that the California committee was wrongfully motivated in calling the plaintiff as a witness. The actual appearance however, absent the alleged evil motivation, was otherwise properly within the Committee's normal legislative powers.

On the other hand it should not require extensive argument to point out that participation in a plan to utilize Louisiana laws to carry out illegal searches and seizures in violation of the Fourth Amendment is conduct utterly unre-

lated to any conceivable legitimate legislative power of the Senate of the United States. The mere assertion by a Senator or his agent that he is engaging in conduct in pursuance of legislative responsibilities is scarcely sufficient. *Kilbourn* v. *Thompson, supra.* Can anyone doubt that if a Senator, purporting to act pursuant to a legislative power, breaks down a door of a private citizen's home or office and seizes his private papers without legal warrant, no "immunity" would attach to such conduct? This is, in essence, the problem posed by this appeal. The assertion that illegal, unauthorized and unconstitutional actions are privileged merely because they are undertaken by legislators and their agents has no support in the holding or rationale of the majority of the Court in *Tenney* v. *Brandhove.**

(b) Appellees further invoke the doctrine of *Barr* v. *Matteo,* 360 U. S. 564 in support of the contention that an absolute cloak of immunity protects them from any claim for relief. But *Barr* v. *Matteo* lends color to this contention no more than does *Tenney* v. *Brandhove.* If anything, *Barr* spells out with even greater precision the limits of the doctrine of legislative immunity.

In *Barr* the Court faced the applicability of the doctrine of immunity to a cause of action in libel brought against a federal executive officer. Mr. Justice Harlan announced the judgment of the Court in an opinion joined in by Justices Frankfurter, Clark and Whittaker. Mr. Justice Black concurred in a separate opinion. Mr. Justice Harlan's opinion upheld the concept of absolute immunity

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* In any event even the limited doctrine of legislative immunity may not apply to appellee Sourwine, an agent of the legislature, and not a legislator himself. See *Tenney* v. *Brandhove,* at p. 378: "It should be noted that this is a case in which the defendants are members of a legislature. Legislative privilege in such a case deserves greater respect than where an official acting on behalf of the legislature is sued * * *." Cf. *Kilbourn* v. *Thompson, supra,* in which the Court allowed judgment against the Sergeant-at-Arms of the House.

only where the actions complained of occurred "in the course of duties" of an official nature. *Barr* v. *Matteo,* at p. 571. The limitations of the doctrine were emphasized by the approving restatement of Judge Hand's remarks in *Gregoire* v. *Biddle,* 177 F. 2d 579, 581 (C. A. 2) to the effect that "the decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers", and that "what is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him." *Gregoire* v. *Biddle,* at p. 581.

In applying this test to the facts then before the Court, Justice Harlan found that "the question is a close one". *Barr* v. *Matteo,* at p. 574. The defendant there was a responsible executive officer whose regular duties included the issuance of press releases. The alleged tortious act consisted of libels contained in such a press release. Justice Harlan concluded that the issuance of a press release was "an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively." *Barr* v. *Matteo,* at p. 575.

The application of the test enunciated in *Barr* to the actions charged against appellees here is striking. The participation in an illegal search and seizure in violation of the Fourth Amendment is scarcely an "appropriate exercise of the discretion" which a legislator or his agent must possess if the legislature is to function effectively. Cf. *Barr* v. *Matteo,* at p. 575. Nor is a conspiracy to utilize Louisiana state law to obtain membership lists of an integration organization during an illegal raid, activity in the "course of duties" as legislator. The issue here is not a "close one", nor is the conduct charged under any interpretation of the facts "within the outer perimeter of [appellees'] line of duty." *Barr* v. *Matteo,* at p. 575.

Mr. Justice Black's concurring opinion in *Barr,* upon which the majority depends, as in *Tenney,* sharply limits the scope of the immunity doctrine. Justice Black points out that the actions complained of in *Barr* were (1) "neither unauthorized" nor (2) "plainly beyond the scope of Mr. Barr's official business". *Barr,* at p. 576. In the instant appeal the wrongful acts charged to appellees were both (1) "unauthorized" * and (2) "plainly beyond the scope of [appellees'] official business". No possible theory of immunity can protect appellees from the remedies provided in the Civil Rights Act under both Justice Harlan's and Justice Black's opinions in *Barr* v. *Matteo.***

(c) The most recent opinion of the Supreme Court in this field, *Wheeldin* v. *Wheeler,* 373 U. S. 656, *supra,* decided last Term, is dispositive in many ways of the instant appeal. In *Wheeldin,* the plaintiff sought damages and injunctive relief as the result of harm caused to him from the service upon him of a subpoena from the House Committee on Un-American Activities. The subpoena was signed in blank by the Chairman of the Committee and the issuance of the subpoena by the defendant, an investigator for the Committee was alleged to be unauthorized by the Committee. The Court of Appeals for the Ninth Circuit sustained the dismissal of the suit on the ground that the allegedly unlawful acts had been committed by the defendant in the line of his duty as a federal officer and that ac-

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* Appellees have sought to show "authorization" for their conduct through the issuance of the October 4th subpoenas. These subpoenas were never authorized by the subcommittee. See Deposition of Sourwine at p. 44 (36a, 37a). See *Shelton* v. *United States,* No. 17,904, Court of Appeals for the District of Columbia, December 30, 1963, and discussion at page 25, *infra.*

** Mr. Justice Stewart's dissent in *Barr* v. *Mattco,* at p. 586, agrees with Justice Harlan's rationale, but would find that the actions complained of were not "action in the line of duty". Justices Warren, Douglas and Brennan would not grant an absolute privilege of immunity even when action is "in the line of duty".

cordingly he was immune from suit by reason of the principle of immunity announced in *Barr* v. *Matteo, supra.*

In the Supreme Court the Solicitor-General of the United States, appearing as counsel for the respondent, conceded that under the allegations of the complaint the doctrine of legislative immunity did not apply since the official "was not acting sufficiently within the scope of his authority to bring the doctrine into play". *Wheeldin* v. *Wheeler,* at p. 651.

The concession of the Solicitor-General in *Wheeldin* applies with particular force to the present facts. Here too, the actions of appellees were totally without the authorization of the legislative committee. See deposition of appellee Sourwine, at p. 44 (36a, 37a). The only conceivable colorable authority for appellees' participation in the fruits of the patently illegal raids were the subpoenas, also signed in blank, and totally unauthorized by the Committee, according to the appellee's own testimony on deposition (36a, 37a). If the conduct of the respondent in *Wheeldin* had to be conceded by the Solicitor-General to be clearly without the scope of authority, a similar concession would be even more appropriate here.

In *Wheeldin* both the majority and dissenting Judges agreed that on the facts before the Court there was no question of legislative immunity. In *Wheeldin,* Justice Black, who had concurred to make the Court in *Tenney* and *Matteo,* joined Justices Brennan and Chief Justice Warren in agreeing with Justice Douglas who wrote for the majority, that since the subpoenas there involved were not issued with Committee authorization, the respondent was acting "manifestly or palpably beyond his authority." Accordingly no doctrine of legislative immunity could be in-

voked. *Wheeldin* v. *Wheeler*, at p. 653.* Similarly here, the subpoenas, through which appellees seek to sanction their participation in the illegal search and seizures, were equally unauthorized (36a, 37a). Under *Wheeldin* v. *Wheeler* no doctrine of legislative immunity may be relied upon to protect appellees.**

2. The Complaint, Affidavits and Depositions Filed Revealed Genuine Issues as to Material Facts

(a) The refusal of appellees or the lower court to acknowledge that there are any outer limits to the doctrine of legislative immunity leads directly to the heart of the error in granting the motion for summary judgment.

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* The majority and dissent in *Wheeldin* disagreed not as to whether the doctrine of legislative immunity was available to the defendant. The entire Court agreed that it was not available. Justice Douglas, for the majority, held that the complaint failed to allege a Fourth Amendment violation. The dissent would have permitted a federal cause of action solely for damages flowing from an unauthorized subpoena. But both the majority and the dissenting Judges make it amply clear that an allegation of Fourth Amendment violations such as presented in this appeal amply sets forth a cause of action for relief.

** Court of Appeals and District Court decisions, relied on by appellees below, invoke the doctrine of immunity only for official acts done in the course of official duties and within the sphere of legitimate legislative or judicial function. See, for example: *Kostal* v. *Stoner*, 292 F. 2d 492 (immunity for judges for official acts in matters within their jurisdiction); *Kenney* v. *Fox*, 232 F. 2d 288 (immunity only for acts done in the exercise of judicial function. No immunity where acts are without judicial jurisdiction); *Morgan* v. *Sylvester*, 125 F. Supp. 380 (immunity for acts performed within the scope of and during the course of official duties). Compare with *Yates* v. *Village of Hoffman Estates*, 209 F. Supp. 75.) ("However not every action by a judge is in exercise of his judicial function. For example, it is not a judicial function for a judge to commit an intentional tort even though the tort occurs in the Court House"); and *Spires* v. *Bottoroff*, 317 F. 2d 273 (wrongful actions of state judge states a cause of action for damages under the Civil Rights Act).

The complaint, affidavits and depositions on file reveal that there is a sharp and genuine issue of fact as to whether appellees' conduct was sufficiently within the scope of official action so as to invoke the protection of any concept of legislative immunity. It was clear error to grant a motion for summary judgment upon such a record. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464; *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 670; *Guinn Co.* v. *Mazza*, 296 F. 2d 441 (CA DC 1961); Rule 56(c) Fed. Rules Civ. Proc. 28 U. S. C. A.*

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* Summary judgment will not be entered where pleadings, depositions and affidavits filed in a case present genuine issues as to any material facts. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464 (1962). In this case the Supreme Court has recently vigorously restated the rules which must govern the determination of a motion for summary judgment. In reversing a motion for summary judgment granted by the District Court in the District of Columbia, the Supreme Court stated: "Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case 'show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Rule 56(c), Fed. Rules Civ. Proc., authorizes summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, * * * [and where] no genuine issue remains for trial * * * [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620. The rule is very clear that a motion for summary judgment may not be granted where there are any disputed issues of fact. *Progress Development Corp.* v. *Mitchell*, 286 F. 2d 222; *Kress, Dunlap & Lane* v. *Downing*, 286 F. 2d 212. The moving party has the burden of demonstrating that there is no genuine issue of fact. *Kress, Dunlap & Lane, supra.* The requirement that there is no genuine dispute as to any material fact will be strictly construed to insure that no factual issue will be determined without the benefit of full litigation procedures. *United States* v. *United Scenic Artists Local*, 27 F. R. D. 499.

Moreover, this Court has recently pointed out that on a motion by a defendant for summary judgment the plaintiff's allegations in

The file before the District Court contained the strongest possible evidence in the form of testimony of one of the appellees indicating that the conduct complained of was totally unauthorized by the Senate Committee and thus "plainly beyond the scope of official business." Cf. *Barr* v. *Matteo, supra.*

Appellee Sourwine testified in his deposition that the subpoenas, dated on their face on October 4, 1963, the day of the raids conducted by the Louisiana defendants, were not, in fact, actually authorized by the Subcommittee of the Senate but were, rather, subpoenas signed in blank by appellee Eastland and filled in at appellee Sourwine's instructions in Louisiana (Sourwine deposition, p. 41 through 44, 36a, 37a). Appellee Sourwine testified directly that there was no authorization by the Committee or Subcommittee for these subpoenas:

> "Q. Did the Committee or Subcommittee authorize the submission of the subpoenas? A. No.
> "Q. Is it customary for them to do so? A. No."

Only recently this Court held on identical testimony that such subpoenas are illegal and invalid. *Shelton* v. *United States,* No. 17904, Court of Appeals for the District of Columbia, Dec. 30, 1963. In the *Shelton* case the testimony of the Subcommittee Chairman, Senator Eastland, was identical to the testimony of appellee Sourwine in this case. In *Shelton* this Court pointed out the Subcommittee chairman testified as follows:

> "Q. Oh, you got the approval of the Subcommittee for all these subpoenas? A. Oh no, not for the subpoena, no, sir * * *." [at p. 10]

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the complaint are required to be treated as true. *Guinn Co.* v. *Mazza,* 296 F. 2d 441 (CA DC 1961). See, also, *Delaware L. & W. Co.* v. *Kingsley,* 189 Fed. Supp. 39. Summary judgment in effect is an extraordinary remedy and accordingly any doubt as to the existence of disputed facts must be resolved against the movant. *Gunther* v. *San Diego and A. E. Railway,* 192 Fed. Supp. 882. See, also, *Moutoux* v. *Gulling Auto Co.,* 295 F. 2d 573.

This Court concluded on such testimony that "Shelton had a right to have the Subcommittee responsibly consider whether or not he should be subpoenaed. Shelton's rights were abridged when the subpoena was issued without Subcommittee authorization." *Shelton* v. *United States*, at p. 12.*

Accordingly this Court held that "since the Subcommittee did not authorize the issuance of the subpoena to Shelton, the subpoena was invalid. Compare *Yellin* v. *United States*, 374 U. S. 109 (1963)." *Shelton*, at p. 11.

The *Shelton* opinion totally disposes of any contention that the conduct of appellees Sourwine or Eastland was authorized by the Committee.** For the lower court to disregard totally the perfectly clear testimony contained in appellee Sourwine's own deposition as to lack of any Committee authorization for appellees' actions and to accept conclusionary statements that appellees "were acting in relation to matters lawfully committed to their responsibility" (see appellees' memorandum in support of motion for summary judgment, at p. 6) was violative of the most elementary principles underlying the summary judgment rule. *Poller* v. *Columbia Broadcasting System, Inc., supra.* There could not be stronger or more convincing evidence in the record that appellee's actions were unauthorized and "plainly beyond the scope of official business". *Barr* v.

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* See also the recent district court opinion in *United States* v. *Grumman*, Dist. Ct. D. C. No. 822-62 and *United States* v. *Silber*, Dist. Ct. D. C. No. 823-62, March 6, 1964, by Youngdahl, J., in which failure of a House Committee to adhere to its own rules resulted in a conclusion that its conduct was unauthorized.

** Compare the comment by this Court in *Shelton* that "Actually, one cannot read this record without realizing that the whole function of determining who the witnesses would be was *de facto* delegated to the Subcommittee counsel." *Shelton*, at p. 11.

*Matteo, supra.** In the face of such record evidence the granting of the motion for summary judgment was clearly erroneous and deprived appellants of their right to litigate in a court of law genuine and material issues of fact. *Poller* v. *Columbia Broadcasting System, Inc.; Sartor* v. *Arkansas Natural Gas Corp; Guinn Co.* v. *Mazza, all supra.* Cf. *Howard* v. *Lyons*, 360 U. S. 597.**

Under identical circumstances the United States District Court for the Eastern District of Louisiana has recently held in the companion case to the instant appeal, *Dombrowski* v. *Burbank,* No. 13967, that a motion to dismiss or for summary judgment must be denied. Judge Ainsworth, on April 20, 1964, entered the following order and opinion denying the motion of James H. Pfister, Chairman of the Louisiana Joint Legislative Committee on Un-American Activities:

> "Mover, a member of the Louisiana Legislature is entitled to absolute immunity under the doctrine

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* Additional serious doubt is cast upon the existence of any authorization for the actions of appellees in the information which came to appellants' attention after the answer to the motion for summary judgment was filed. See affidavits of counsel (30a-35a). The letter of Senator Kenneth B. Keating on Jan. 30, 1964 to appellee Eastland (33a, 34a) raises additional serious questions of fact concerning whether appellees' actions were within the legitimate sphere of legislative activity. Cf. *Tenney* v. *Brandhove, supra.*

** *Howard* v. *Lyons* is instructive here. The Court points out that the mere statement by a defendant that his acts were part of his official duties does not dispose of the question on a motion for summary judgment. "* * * such an averment by the defendant cannot foreclose the courts from examination of the question * * *." At p. 597. In *Howard* there were "uncontradicted" affidavits that the action complained of was authorized and part of official duties and was "in relation to matters committed to him for determination." At p. 598. Here, there is "uncontradicted" testimony in the Sourwine deposition which shows conclusively that the actions of appellees were unauthorized and beyond the scope of authority. Applying the principles of *Howard* v. *Lyons,* summary judgment should have been denied.

> of *Tenney* v. *Brandhove,* 341 U. S. 367, 71 S. Ct. 738 (1951), if the affidavits and deposition submitted by the parties indicate that he was acting at the time 'in the sphere of legitimate legislative activity.' Here there is a sharp dispute as to the facts upon which we can conclude whether or not the defendant was engaged in permissible legislative activity on the dates when he is alleged to have committed tortious acts against plaintiff. As was said in *Tenney, supra,* 'The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive. The present case does not present such a situation.' The United States Supreme Court decision was therefore predicated upon the state of facts which it found in the Tenney case. Since there is a genuine issue as to material facts, summary judgment is not permissible under Rule 56 of the Federal Rules of Civil Procedure. See National Screen Service Corp. v. Poster Exchange, Inc., 5 Cir. 1962, 305 F. 2d 647. A full trial on the merits is necessary to determine the respective rights of the parties. We express no opinion now as to the facts, beyond stating that they are vigorously disputed between the involved parties."

As in the companion case decided by Judge Ainsworth, there was presented to the lower court a "sharp dispute as to the facts upon which we can conclude whether or not the defendant[s] [were] engaged in permissible legislative activity." The motion for summary judgment should have been denied and the case permitted to go to trial.

B. In addition to the sharply disputed questions of fact relating to appellees' claim of immunity, the record presents sharply disputed material issues of fact relating to appellees' alleged participation in the charged conspiracy re-

quiring a trial of the issues of fact. *Poller* v. *Columbia Broadcasting System* and cases cited *supra.*

The complaint alleges that appellees Eastland and Sourwine participated in a plan and conspiracy, together with the other named defendants, to utilize certain Louisiana state statutes to seize documents, files, membership lists and lists of contributors, in violation of the appellants' federally protected rights under the First, Fourth and Fourteenth Amendments, which material would be otherwise totally unavailable to the appellees under the prohibitions of the federal Constitution. This is a major factual allegation of the complaint. This is an allegation which gives rise to the federally created cause of action for relief. See *Monroe* v. *Pape* and cases cited *supra.*

Appellee Eastland filed an affidavit with the lower court in which he states:

> "I had nothing whatever to do with the acquisition of the SCEF material by the Louisiana Committee, or with the preparation, issuance, or service of the arrest and search warrants whereunder the Louisiana authorities obtained the material of SCEF which was later subpoenaed by the Senate Internal Security Subcommittee. I deny emphatically that I was party to any conspiracy to obtain and execute such warrants, or to subpoena the material."

Appellee Sourwine makes the same denials in his affidavit, previously submitted. Rogers, Burbank and Willie, all defendants in the companion suit in Louisiana, make similar denials in their affidavits. These affidavits simply are in the form of denials made to the major allegations of fact contained in the verified complaint.

Appellees urge that their naked denials of the central allegations of the complaint are sufficient to ground summary judgment relying upon Rule 56(c) Fed. Rules Civ.

Proc. as amended January 21, 1963.* This argument totally disregards the state of the record. The complaint, affidavits and depositions contain strong evidence of both the existence of the charged conspiracy and appellees' participation in it.

The following essential facts emerge from the complaint, affidavits and depositions from which a plan or conspiracy participated in by appellees can be inferred. Cf. *Glasser* v. *United States*, 315 U. S. 60; *Delli Paoli* v. *United States*, 352 U. S. 232.

> (a) the meetings of appellee Sourwine and Rogers, the Louisiana Committee counsel, in the summer of 1963, at which the records, lists and files of SCEF were discussed (Deposition of Sourwine, p. 21-25).
>
> (b) the illegal raids, searches and seizures on the afternoon of October 4th, 1963, conducted on warrants issued without probable cause in which Rogers and Pfister played a prominent role, and during which the very records, lists and files discussed in the summer meetings with appellee Sourwine were illegally seized (18a, 19a, 20a).
>
> (c) the close proximity in time between the illegal raids during which the records and files were seized and the phone call to appellee Sourwine, sometime the evening of the same day, informing him that Rogers and Pfister now had the records and files in their possession (Deposition of Sourwine, p. 32).
>
> (d) the issuance of purported subpoenas by the appellees for these illegally seized records and files

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* The amendment reads as follows:

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

on the very day of the illegal raids, October 4th. [Appellees contend this was a "secretarial error" and that the subpoenas should have read "October 5th".] (35a, 36a)*

(e) the appearance of appellee Sourwine in Baton Rouge, Louisiana, the morning after the illegal raids, prepared with blank subpoenas signed in advance by appellee Eastland (35a, 36a).

(f) the failure of appellees to obtain Subcommittee authorization for these purported subpoenas or for their actions in Louisiana (35a, 36a).

(g) the telephone call of appellee Eastland to appellee Sourwine the night before the hearing scheduled in New Orleans, Louisiana, before Federal District Judge Ainsworth, instructing Sourwine to arrange to have the seized materials removed from Louisiana, and the subsequent telephone call from appellee Sourwine to Louisiana officials sometime late Sunday evening to arrange the midnight transportation of the seized materials across the state boundaries to Woodville, Mississippi (29a).

(h) the letter of Senator Kenneth B. Keating to appellee Eastland indicating that at least one member of the Subcommittee had no knowledge whatever of these activities (33a).

Upon this state of the record it was clear error to grant appellees' motion for summary judgment. Participation in a conspiracy need not be proved by direct evidence, but a common purpose and plan may be inferred from a development of circumstances. *Glasser* v. *United States,* 315 U. S. 60; *United States* v. *Randall,* 164 F. 2d 284; *United States* v. *Hack,* 205 F. 2d 727; *United States* v. *Giuliano,* 263 F. 2d 582. Moreover, ordinarily, conspiracies must of necessity

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* It is of some interest that all of the subpoenas made out by appellees bear the same "secretarial error", October 4th, on their face, as well as the letter sent by appellee Sourwine to a Louisiana police official designating him as "Custodian" of the seized material (36a).

be established largely by indirect and circumstantial evidence, *Delli Paoli* v. *United States,* 352 U. S. 232; *Madson* v. *United States,* 165 F. 2d 507.

Appellants have more than adequately carried their burden at this point in the litigation in establishing that upon the complaint, affidavits, and depositions on file, controverted material issues of fact exist which require a trial of this case. The order of the lower court arbitrarily denies the appellants their constitutional right to a day in court. *Poller* v. *Columbia Broadcasting System* and cases cited *supra.*

C. The lower court abused its discretion in denying appellants' request for a continuance in order to permit affidavits to be obtained or depositions to be taken. Rule 56, subdivision (f), Fed. Rules Civ. Proc. See affidavits of counsel (30a, 32a, 34a).*

On February 6, 1964, subsequent to the filing of the motion for summary judgment a news item appeared in the *New Orleans Times Picayune* which stated in part:

> "Sen. Kenneth B. Keating (R. N. Y.), a member of the Senate Internal Security Subcommittee, has protested the subcommittee's subpoena of records of the Southern Conference Educational Fund.
>
> "Records of the New Orleans based group were first seized last Oct. 4 at the request of the Louisiana Joint Legislative Committee on Un-American Activities.
>
> * * *

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* Rule 56 subdivision (f) provides as follows:

"(f) *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

> "Sen. Keating was absent Nov. 14 when the Senate subcommittee approved a resolution authorizing the copying of SCEF records. Monday, he expressed 'grave concern' and said no such action should be taken in the future without full discussion of the subcommittee.
>
> "His statement was made in a letter to subcommittee chairman James O. Eastland (D. Miss.).
>
> "He asked Sen. Eastland what legislative purpose the subpoena had. He said he opposed the federal subpoena of records in cases before state courts."

Appellants requested in their formal answer to the motion a continuance pursuant to Rule 56 subdivision (f) of the Fed. Rules of Civ. Proc. in order to obtain additional affidavits or depositions relating to this new indication of the existence of facts tending to show that the actions of appellees were totally unauthorized. Cf. *Tenney* v. *Brandhove; Howard* v. *Lyons,* cited *supra.*

The letter of Senator Keating which came to appellants' attention shortly before the argument, see affidavit of counsel submitted to the Court on the day of argument (32a, 33a), further indicated that additional serious facts were probably available to appellants if a reasonable opportunity had been afforded them to obtain affidavits or take depositions as Rule 56(f) provides. No harm could possibly have been done to appellees by giving appellants the continuance the Rule contemplates. It was an abuse of discretion to deny this request.*

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* It was especially arbitrary to deny appellants opportunity to obtain and present to the Court the typewritten deposition of James H. Pfister, a defendant in the companion case which would have been available only a few days after the argument on the motion for summary judgment. See affidavit of counsel, offered to the Court on argument but not accepted (34a). It was partially on the basis of this deposition that the motion for summary judgment was denied in the companion case. See p. 27, *supra.*

POINT II

The complaint stated a cause of action for equitable relief.

A. The earlier action of the lower court, by Judge Holtzoff, in dismissing the complaint on its face insofar as it sought injunctive relief was wholly erroneous. In summarily dismissing the complaint for equitable relief the District Court treated the action as a request for injunctive relief against threatened actions of a Committee of the United States Senate. Invoking the time-honored principle of "separation of powers," the lower court dismissed the claim for equitable relief holding that "this Court may not enjoin a Congressional Committee from pursuing its activities" (13a).

The lower court totally misconstrued the cause of action. The complaint did not seek injunctive relief against the functioning of a Congressional Committee. The gravamen of the cause of action, insofar as it affected appellees Eastland and Sourwine, was the charge that these individuals, together with other individuals, participated in a plan of conspiracy to utilize the laws of the State of Louisiana to deprive the appellants of rights, privileges and immunities secured to them by federal law. Cf. *Monroe* v. *Pape, supra;* see Title 42 U. S. C. 1983, 1985.*

The complaint further charged that these individuals "without warranty or authority of law" pursuant to the conspiracy "secretly and surreptitiously" were in possession of certain books, records and other documents which

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* Since this order dismisses a bill in equity on its face, for the purposes of this appeal all allegations of the complaint must be deemed to be true. *Clark, Attorney-General* v. *Vebersee Finanz-Korporation,* 332 U. S. 480. See also *Mast, Foos & Co.* v. *Stover Manufacturing Co.,* 177 U. S. 485, relied upon by the lower court as procedural authority for its order of dismissal.

had been seized in the illegal raids of October 4th conducted under color of laws of the State of Louisiana (Complaint, paragraph 22, 7a).

The complaint goes on to charge that "in order to evade the jurisdiction" of the United States District Court for the Eastern District of Louisiana, the defendants transferred certain of these documents and records to the District of Columbia and that these "are presently in the possession of defendants Eastland and Sourwine in the District of Columbia". Other documents and records belonging to appellants were "also secretly and surreptitiously transferred to a State Court House in the State of Mississippi and are presently in the possession of defendant Eastland" (Complaint, Paragraph 22, 7a).

The complaint nowhere charges that the illegally seized records or documents were in the custody or possession of the Senate Committee. It charges solely that they were illegally and without "warrant of law" in the possession of the individual appellees, Sourwine and Eastland, who had obtained them pursuant to a conspiracy to utilize Louisiana state laws to violate appellants' federally protected rights.

This complaint clearly states a cause of action for equitable relief under the Civil Rights Act. *Hague* v. *CIO*, 307 U. S. 496; *Bush* v. *New Orleans Parish School Board*, 188 F. Supp. 916, aff'd 365 U. S. 569; *Jordan* v. *Hucheson*, 323 F. 2d 597 (C. A. 4, 1963), and cases cited *supra*. The fact that appellees Eastland and Sourwine happen also to be federal officers is utterly immaterial. The conspiracy charged is one to utilize *state laws* to interfere with federally protected rights. The doctrine of separation of powers has no relevance here. The complaint charges that these appellees, together with legislative and executive officials of the state, conspired to use state law to conduct the illegal raids. The fact that they are "legislative"

officers, has no impact upon the power of a federal court to grant equitable relief. This question has been fully and carefully analyzed in a recent opinion of the Court of Appeals for the Fourth Circuit, *Jordan* v. *Hutcheson,* 323 F. 2d 597 (September, 1963). Thus the Court pointed out:

> "Although the federal courts will recognize and respect the state's right to exercise through its legislature broad investigatory powers, nevertheless these powers are not unlimited and it remains the duty of the federal courts to protect the individual's constitutional rights from invasion either by state action or under color thereof. Especially is this true in the sensitive areas of First Amendment rights and racial discrimination. Where there exists the clear possibility of an immediate and irreparable injury to such rights by state legislative action the federal courts have exercised their equitable powers including the declaratory judgment and the injunction * * *."

See in particular *Bush* v. *Orleans Parish School Board,* 191 F. Supp. 871 (E. D. La. 1961) aff'd per curiam; *Denny* v. *Bush,* 367 U. S. 908, in which a three-judge federal district court issued an injunction against the Louisiana legislature and the individual members thereof.

As far as the complaint is concerned, and that, we stress, is all that was properly before Judge Holtzoff on a motion to dismiss, injunctive relief was sought to restrain these and other appellees who had participated in a conspiracy under color of state law, from using or disposing of the fruits of the illegal search and seizures. There was no allegation whatsoever that the illegally seized material was in the possession of the Senate Committee, nor was any injunctive relief sought against the Committee. As a matter of fact, as far as the complaint was concerned a good portion of the illegally seized material was then sitting

in the private possession of appellee Eastland in a state courthouse in the State of Mississippi (7a).*

The precipitate dismissal action taken by the lower court can only be explained upon some theory that because one of the charged tort-feasors and conspirators was a Senator and the other an employee of a Senate Committee, anything they ever did, anywhere, and under any circumstances, was, by operation of some irrebuttable presumption, action on behalf of the Senate. This of course flies in the face of every legal and historical precedent. See cases and discussion in *Point I, supra.*

B. The lower court sought to justify the dismissal of the complaint prior to answer, or even prior to a properly litigated motion to dismiss brought by the defendants, upon the authority of *Mast, Foos Co.* v. *Stover Manufacturing Co., supra.* But the Supreme Court in *Mast, Foos* carefully pointed out that a bill in equity could be

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* Paragraph 22 of the Complaint states:

"22. In further pursuance of this conspiracy defendants Burbank, Willie and Pfister, at the request of defendants Eastland and Sourwine secretly and surreptitiously, without warrant or authority of law, transferred a portion of said books, records, documents and other articles belonging to the plaintiffs out of the jurisdiction of the United States District Court for the Eastern District of Louisiana. Plaintiffs had instituted in that Court a proceeding under appropriate federal statutes to obtain the return of said documents and articles, and to receive appropriate redress under the law for the illegal acts of the defendant conspirators. In order to evade the jurisdiction of that Court, the defendants caused to be transferred a portion of the said documents, records and other articles to the District of Columbia. Upon information and belief said documents, articles and records are presently in the possession of defendants Eastland and Sourwine in the District of Columbia. Other documents and records, all belonging to the plaintiffs, illegally and in violation of the Constitution of the United States seized from them, were also secretly and surreptitiously transferred to a State Court House in the State of Mississippi, and are presently in the possession of defendant Eastland."

dismissed prior to answer only if the bill "be obviously devoid of equity upon its face" and that "if the case involves a question of fact we think the parties are entitled to put in their evidence."

Since the complaint "upon its face" nowhere alleged that the fruits of the illegal state raids were in the possession of a Senate Committee it was clearly erroneous for the lower court to dismiss the action summarily. Moreover, the circumstances of the dismissal illustrates the impropriety of the dismissal. Appellants, as the lower court opinion reveals (12a), had sought, pursuant to the normal procedures of the District of Columbia, to withdraw their own motion for a temporary injunction in order to obtain evidence by way of a deposition of one of the appellees before renewing the motion for preliminary relief (12a). The lower court refused to permit appellants to withdraw the motion. But the deposition which appellants sought to take in support of an application for *equitable* relief, was the deposition of appellee Sourwine, later taken in support of the cause of action for damages. This deposition, as we have discussed above, see *Point I, supra,* revealed that appellees' conduct and indeed "possession" of the seized materials was totally without the authorization of the Committee (36a, 37a). Clearly, at a minimum, whether or not the seized documents were in the "possession" of the Committee was a question of fact which could not have been decided from the face of the complaint. It was plainly erroneous to dismiss the complaint for equitable relief under the doctrine of *Mast, Foos Co.* v. *Stover Manufacturing Co.,* and to deny appellants any opportunity to "put in their evidence". *Mast, Foos Co., supra.*

C. The authorities relied upon by the lower court to justify its dismissal of the equitable cause of action, merely emphasizes its misreading of the instant complaint. Both *Hearst* v. *Black,* 66 U. S. App. D. C. 303, 86 F. 2d 68 and

Methodist Federation for Social Action v. *Eastland,* 141 F. Supp. 729, involve attempts to enjoin Senate Committees from carrying through investigations or otherwise authorized legislative activities. Here the injunctive relief is neither directed against the Senate Committee or authorized legislative activities. To the contrary, we have seen that the actions of appellees were totally unauthorized by the Senate Committee. See Sourwine deposition and discussion, *supra,* in *Point I.*

Similarly the decisions of this Court in *Pauling* v. *Eastland,* 109 U. S. App. D. C. 342, 288 F. 2d 176, and *Mins* v. *McCarthy,* 93 U. S. App. D. C. 220, 209 F. 2d 307, are inapposite. These cases involve attempts to enjoin otherwise legitimate legislative functions of a Senate Committee, not involved here, but more fundamentally they do not stand for the sweeping proposition advanced by the lower court that the federal courts will never exercise equitable powers in relation to the legislative branch of government.

In *Pauling,* for example, the decision turns on the fact that no justiciable act had occurred which would give the Court power to exercise its equity jurisdiction. Moreover, the complainant had not convinced the Court that defense to a contempt citation would not be an adequate remedy for the injuries charged. See in this connection the analysis of *Pauling* in the recent opinion of the Fourth Circuit in *Jordan* v. *Hutcheson, supra,* at p. 605. These are typical equitable considerations ordinarily withholding the availability of injunctive remedies.* They do not support a

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* The contrast of *Pauling* to the present complaint is interesting. This Court said in *Pauling* that the plaintiff there had a remedy in a defense to a contempt action for refusal to comply with the subpoena duces tecum. Here the appellant had no such remedy at all. The materials had *already* been illegally seized and the purported Committee subpoenas were not directed to them but to fellow conspirators in the illegal state raid. In the narrowest terms, therefore, appellants here, unlike in *Pauling,* had no remedy at all other than the one pursued under the Civil Rights Act.

blanket proposition denying the existence of equitable jurisdiction over actions of legislators or their agents which transcend constitutional bounds.*

CONCLUSION

The order granting summary judgment on the cause of action for damages and the order dismissing the cause of action for equitable relief should be reversed.

Respectfully submitted,

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* Indeed, such a proposition would itself transgress against first principles. It is helpful to recall that *Marbury* v. *Madison*, 1 Cranch 137, asserts the fundamental role of the judiciary in restraining the legislature within its constitutional confines. Chief Justice Marshall there wrote in words here appropriate:

> "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? * * *"

BRIEF AND APPENDIX FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18435, 18544

JAMES A. DOMBROWSKI, ET AL., APPELLANTS

v.

COLONEL THOMAS D. BURBANK, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

Appellants brought suit against appellees Senator Eastland, Chairman of the United States Senate Internal Security Subcommittee and Mr. J. G. Sourwine, Chief counsel of said subcommittee, alleging that appellees conspired with certain named and unnamed defendants to deprive them of the rights, privileges and immunities guaranteed them by the laws and constitution of the United States. Jurisdiction was founded upon the Civil Rights Statutes. These consolidated appeals are from two orders of the District Court. One order denied appellants request for temporary injunctive relief and dismissed so much of the complaint as sought permanent, mandatory injunctive relief. The other order granted appellees' motion for summary judgment. In the opinion of appellees the following questions are presented.

1. Whether the District Court erred in granting appellees' motion for summary judgment, and denying appellants' last minute request for a continuance:

a. Where the affidavits attached to appellees' motion for summary judgment conclusively demonstrated that no genuine issue of material fact existed to support appellants unsubstantiated allegation that appellees conspired to deprive appellants of their rights, privileges and immunities, such allegation being based upon information and belief.

b. Where the affidavits attached to appellants' opposition to the motion for summary judgment and the deposition of appellee Sourwine, taken by appellants, failed to support the conclusionary charge of conspiracy against appellees and failed to traverse one single fact set forth in detail in appellees' affidavits demonstrating that appellees did not take part in or know of any conspiracy to deprive appellants of their civil rights.

c. Where appellants in their request for a continuance on the morning of the hearing upon the motion for sum-

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mary judgment failed to inform the trial court why affidavits were unavailable at that time and what information they sought that would create a genuine issue of material fact as required by Rule 56(f) F.R. Civ. P.

2. Whether the District Court could have properly granted appellees' alternative motion to dismiss:

a. Where appellees as federal officers and members of the legislative branch of the federal government, acting within the scope of their legislative authority, are immune from civil liability for money damages under the legislative immunity doctrine.

3. Whether the District Court properly denied appellants' motion and prayers for equitable relief restraining appellees from using records subpoenaed by a United States Senate Subcommittee:

a. Where the record before the court demonstrated that appellees personally never had possession of the records, and appellants' records, by Subcommittee Resolution, had been incorporated into the Subcommittee's hearing record prior to the hearing on appellants' motion for injunctive relief.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18435, 18544

JAMES A. DOMBROWSKI, ET AL., APPELLANTS

v.

COLONEL THOMAS D. BURBANK, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE[1]

This is a consolidated appeal from two orders entered by the District Court in favor of the appellees. The first order, dated December 18, 1963, denied appellants' request to enjoin the Chairman of the United States Senate Internal Security Subcommittee, Senator James O. Eastland, and J. G. Sourwine, Counsel for the Subcommittee, from making use of certain documents and records, or copies thereof, that were then in the custody and possession of the Subcommittee. The order further dismissed so much of the complaint as sought permanent injunctive relief against appellees (J.A. 14a) (Appeal No. 18435).

The second order appealed from and dated March 26, 1964, granted appellees' motion for summary judgment (J.A. 17a) (Appeal No. 18544).

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[1] See also, Statement of Material Facts Pursuant to Local Rule 9(h) (J.A. 90a).

Appellants' complaint alleged that appellees [2] conspired with certain named and unnamed individuals to deprive them of their civil rights and the privileges and immunities guaranteed by the United States Constitution (J.A. 3a). Jurisdiction was founded on the so called "Civil Rights Statutes", 28 U.S.C. §§ 1331(a), 1343(3)(4), 2201, 2202, 2281; 42 U.S.C. §§ 1981, 1983, 1985 and the First, Fourth, Fifth and Fourteenth Amendments to the Constitution (J.A. 2a). The complaint sought both permanent and mandatory injunctive relief and money damages in the sum of one half million dollars (J.A. 10a).

Appellant Southern Conference Educational Fund Inc.,[3] is a corporate body organized under the laws of the State of Tennessee with offices located in New Orleans, Louisiana (J.A. 1a, 3a). Appellant James A. Dombrowski is the managing director of SCEF (J.A. 18a).

For the purpose of facilitating the Court's understanding of the matter, appellees will present the undisputed facts chronologically.[4] In 1954 the United States Senate Internal Security Subcommittee conducted an investigation and in 1955 published a report dealing with SCEF and its parent organization the Southern Conference for Human Welfare (J.A. 43a). According to the Subcommittee report the Southern Conference for Human Welfare was found to be a "Communist front organization" (J.A. 43a), and James A. Dombrowski, who had been the administrator of the Southern Conference for Human Welfare, prior to its dissolution, was identified by witnesses who testified before the Subcommittee, as having been a member of the Communist Party (J.A. 44a).

In 1960, the Legislature of the State of Louisiana created a Joint Legislative Committee [5] on Un-American Activities (J.A.

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[2] Of the named and unnamed defendants in the complaint only Senator James O. Eastland and J. G. Sourwine received service of process and are presently before this Court.

[3] Hereinafter referred to as SCEF.

[4] In the court below, pursuant to local rule 9(h), appellees filed a statement of material facts (J.A. 90a–102a). At no time did appellants challenge the accuracy of the statement.

[5] James A. Pfister, a named defendant, was appointed Chairman of the Committee.

73a). Jack N. Rogers was appointed counsel for the Joint Committee (J.A. 73a). SCEF was among various organizations investigated by the Louisiana Joint Committee (J.A. 76a). Sometime in July 1963, Mr. Rogers contacted counsel for the Senate Subcommittee, appellee Sourwine, and requested the Subcommittee to furnish him with any information that it could properly give him relating to SCEF (J.A. 44a, 77a). Mr. Rogers also advised Mr. Sourwine that the Louisiana Joint Committee contemplated subpoenaing the records [6] of SCEF at some future date and that if any information was obtained that might relate to the responsibilities of the Senate Subcommittee, he would so advise Mr. Sourwine (J.A. 44a, 77a). In August or September, 1963, Mr. Rogers contacted Mr. Sourwine by telephone and requested the assistance of Mr. Sourwine and Mr. Mandel, Research Director of the Senate Subcommittee, in evaluating the records of SCEF in the event they were subpoenaed by the Louisiana Joint Committee (J.A. 45a, 77a). Mr. Sourwine took the matter up with Senator Eastland, chairman of the Senate Subcommittee, who advised Mr. Sourwine that his judgment would have to be based upon what was found in the records by the Louisiana Joint Committee; that if they should appear to be within the scope of the Subcommittee's investigative authority, then Mr. Sourwine and Mr. Mandel, might go to Louisiana to evaluate them (J.A. 45a). Senator Eastland emphasized to Mr. Sourwine that the Senate Subcommittee was interested only in material relating to Communist or Communist front activities and not matters relating to civil rights or racial activities. (Sourwine deposition p. 26–28; affidavit J.A. 45).

On October 4, 1963, the Louisiana authorities acquired possession of SCEF's records (J.A. 86a). The circumstances of this acquisition, with which Senator Eastland and Mr. Sour-

[6] Although appellants throughout their brief imply that Mr. Rogers and Mr. Sourwine discussed acquiring SCEF's records, files, membership lists and contributors lists, the record refutes this. The record does reflect that while Mr. Rogers informed Mr. Sourwine that the Louisiana Joint Legislative Committee contemplated subpoenaing the records of SCEF, no discussion ever took place as to what specific records the Louisiana Committee contemplated subpoenaing (J.A. 44a, 50a, 77a).

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wine had nothing to do (J.A. 101a) are related in detail in the affidavits of Mr. Rogers and Russell R. Willie (J.A. 78a, 85a).

In the late evening hours of October 4, 1963, Mr. Rogers telephoned Mr. Sourwine at his home in Silver Spring, Maryland, and urged him to come to Baton Rouge, Louisiana, as soon as possible, to examine the records (J.A. 78a–79a). Mr. Sourwine accompanied by Mr. Mandel, arrived in Baton Rouge the following day, October 5, 1963 (J.A. 79a). Having been advised by Mr. Rogers and Colonel Alexander, Chief investigator for the Louisiana Joint Committee, on October 4, 1963, of the nature and content of the SCEF records, Mr. Sourwine concluded upon examination of some of the SCEF records that they did in fact include material that would be of interest to the Senate Subcommittee within the limitations imposed by Senator Eastland. Mr. Sourwine recommended to Senator Eastland that all the records of SCEF in the possession of the Louisiana Joint Committee should be subpoenaed by the Senate Internal Security Subcommittee. Senator Eastland authorized the records to be subpoenaed (J.A. 45a–46a).

On October 5, 1963,[7] Mr. Sourwine served officials of the Louisiana Joint Committee with subpoenas *duces tecum* signed by Senator Eastland as Chairman of the Senate Subcommittee. The subpoenas required production in the offices of the Senate Subcommittee of the SCEF records possessed by the Louisiana Joint Committee. Mr. Sourwine then arranged for Colonel Burbank, Superintendent of the Louisiana State Police to act as custodian of the records pending their transfer to the Subcommittee's offices in Washington, D.C. (J.A. 46a). The records were subsequently brought to the District of Columbia for study and evaluation by the Senate Internal Security Subcommittee (J.A. 46a). On November 14, 1963, the Subcommittee formally passed a resolution incorporating the SCEF records into the Subcommittee's hearing record (J.A. 40a).

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[7] Appellants attempt to make much of the fact that the Subcommittee's subpoenas *duces tecum* were dated October 4, 1963, when the record conclusively demonstrated without contradiction that the subpoenas were typed after Mr. Sourwine arrived in Louisiana on October 5, 1963. The error in typing October 4, 1963, instead of October 5, 1963 is fully explained in the affidavits of Mr. Sourwine, Mr. Pfister, Mr. Rogers and Mrs. Nicholson (J.A. 46a, 79a, 88a).

A. The events surrounding the acquisition of SCEF's records by the Louisiana authorities

The affidavits filed by appellees and the deposition of Mr. Sourwine taken by appellants, show that after Mr. Rogers' telephone conversation in August or September, 1963, with Mr. Sourwine, there were no further communications between any representative of the Senate Subcommittee and any representative of the Louisiana authorities, relating to the possible acquisition of SCEF's records by the Louisiana Committee, until Mr. Rogers informed Mr. Sourwine on October 4, 1963, that the records were in the custody of the Louisiana Joint Committee (J.A. 53a).

The aforementioned affidavits and deposition further show that Mr. Rogers and the Louisiana Joint Committee concluded upon the basis of their investigation, that SCEF and its officers were operating in violation of a Louisiana criminal statute. This information was made known to the Louisiana police authorities (J.A. 77a). It was determined by the Louisiana authorities that they would proceed by way of arrest and search warrants, rather than by way of subpoena, in seeking the records of SCEF. This decision was reached on or about September 20, 1963 (J.A. 77a). Senator Eastland and Mr. Sourwine were not advised of or consulted about this decision and had nothing to do with the arrests and seizures that resulted in the Louisiana authorities acquisition of SCEF's records (J.A. 40a, 47a, 80a, 87a). Indeed, both Mr. Sourwine and Senator Eastland had been given to understand that if the Joint Committee sought to obtain SCEF's records they would be acquired by the Louisiana Joint Committee by way of subpoena *duces tecum*, served upon the officers of SCEF (J.A. 50a).

B. Affidavits filed by appellants in opposition to appellees' motion for summary judgment

Attached to appellants' opposition to the motion for summary judgment, filed February 10, 1964, were two affidavits. The affidavit of appellant Dombrowski (J.A. 20a) relates the aims and purposes of SCEF and the educational background of Mr. Dombrowski. In the affidavit, Mr. Dombrowski states that he is not a communist and SCEF is not a subversive organiza-

tion. He describes in detail the manner in which the Louisiana police authorities conducted the search and seizure that led to the acquisition of the SCEF records by the Louisiana Joint Committee. He concludes by listing in detail the various records and articles that were seized by the Louisiana authorities.

The other affidavit was sworn to by Benjamin E. Smith, an officer of SCEF (J.A. 26a). In his affidavit Mr. Smith states the aims and purposes of SCEF, and relates certain events surrounding the investigation of SCEF and Mr. Dombrowski by the United States Senate Internal Security Subcommittee in 1954, in which he acted as counsel for Mr. Dombrowski. He further states that the arrest warrants executed by the Louisiana police authorities on October 4, 1963, were subsequently judicially determined to have been improvidently issued. The affidavit concludes by reciting appellant Dombrowski's attempt to prevent the removal of the seized records from the State of Louisiana.[8]

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[8] Although irrelevant to the charge of conspiracy to deprive them of their civil and constitutional rights, appellants seek to attribute some wrongful action on the part of appellees to the removal of the subpoenaed SCEF records from the State of Louisiana. The record, which is undisputed, reflects that on October 5, 1963, the date the SCEF material was subpoenaed by the Senate Subcommittte, Mr. Sourwine arranged for Colonel Burbank to act as custodian of the subpoenaed material on behalf of the Senate Subcommittee (Sourwine Deposition p. 44). According to appellants, on October 27, 1963, they filed with Judge Ainsworth, District Judge, Eastern District of Louisiana, an application for a temporary restraining order. That on Sunday afternoon, October 27, 1963, they were instructed by Judge Ainsworth, through the Clerk of the Court, to notify the other parties to be present in his office at 9:30 A.M., October 28, 1963, for the purpose of discussing the application for a temporary restraining order (J.A. 29a). In the evening hours of Sunday, October 27, 1963, Senator Eastland advised Mr. Sourwine that he had received a telegram in Washington, D.C., signed by Mr. Brener, counsel for appellants, stating that Judge Ainsworth requested his presence the following morning at 9:30 A.M. (Sourwine Deposition p. 52). Both Senator Eastland and Mr. Sourwine were in the District of Columbia area at the time. Prior to the hearing before Judge Ainsworth on the application for a temporary restraining order, the SCEF material was removed from the State of Louisiana. At the time the SCEF material was removed from Louisiana, it was in the possession of the Senate Subcommittee pursuant to the subpoenas *duces tecum* served on October 5, 1963. Moreover, neither Senator Eastland nor Mr. Sourwine had been served with any process or directed by any court to take or refrain from taking any action relating to the SCEF material in the possession of the Senate Subcommittee (Sourwine Deposition p. 55).

C. Proceeding below

On October 31, 1963, appellants filed a complaint in the District Court. Senator Eastland and Mr. Sourwine were the only named defendants served. On the same date, appellants filed a motion for temporary injunctive relief which was denied by the District Court on December 18, 1963. Appellants took appellee Sourwine's deposition on December 30, 1963.

Appellees on January 28, 1964, filed a motion for summary judgment or in the alternative to dismiss. Incorporated in this motion were the affidavits of Senator Eastland and Mr. Sourwine previously filed, and attached to the motion were the affidavits of Mr. Rogers, Mrs. Nicholson and the other named defendants (J.A. 73a, 88a, 81a, 84a, 66a). Attached to appellants' opposition were the affidavits of appellant Dombrowski and Mr. Benjamin E. Smith (J.A. 20a, 26a) and an affidavit of counsel (J.A. 30a). This opposition was filed on February 10, 1964.

Appellees' motion for summary judgment came on for hearing before the District Court on March 12, 1964. On the same day, during argument on the motion, appellants requested a continuance to file the deposition of James A. Pfister, Chairman of the Louisiana Joint Committee. This deposition had been taken by appellants' counsel on February 26, 1964 in an action filed by them on behalf of these same appellants in the Eastern District of Louisiana (J.A. 35a).[9] Appellants also requested a continuance on the ground that they had acquired a copy of a letter from Senator Keating addressed to Senator Eastland expressing concern over the Subcommittee's action. They did not advise the District Court what additional

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[9] Appellants have seen fit to go outside the record in this case and discuss two suits that were instituted by appellants in the State of Louisiana. *Dombrowski* v. *Pfister*, 227 F. Supp. 556 (Three Judge Court, E.D. La. 1964), dissenting opinion of Judge Widsom; *Dombrowski* v. *Burbank*, No. 13967 (E.D. La.). Appellees were not parties in either suit. Appellants attempt to show from these cases that the trial court erred in granting appellees' motion for summary judgment. Appellees feel constrained to advise this Court that the District Court in Louisiana granted the motion for summary judgment of Colonel Burbank for the same reasons advanced by appellees in the case at bar. See Appendix B, Opinion of Judge Ainsworth.

information or facts they hoped to discover from these sources or why affidavits setting forth such information could not earlier have been obtained. After hearing argument of counsel the District Court granted appellees' motion for summary judgment.

STATUTES AND RULES INVOLVED

Title 28, United States Code, Section 1343, provides in pertinent part:

> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Title 42, United States Code, Section 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 42, United States Code, Section 1985, provides in pertinent part:

> (3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire

to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President or as a member of Congress of the United States, or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Rule 56, of the Federal Rules of Civil Procedure, provides in pertinent part:

(4) Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Rule 9, Rules of the United States District Court for the District of Columbia, provides in pertinent part:

(h) In addition to the points and authorities required

by *subparagraph* (b) of this Rule there shall be served and filed with each motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure a statement of the material facts as to which the moving party contends there is no genuine issue.

Any party opposing the motion, may, not later than three days prior to the hearing, serve and file a concise "statement of genuine issues" setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated.

In determining any motion for summary judgment, the Court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are asserted to be actually in good faith controverted in a statement filed in opposition to the motion.

SUMMARY OF ARGUMENT

I

The District Court properly granted appellees' motion for summary judgment. It was apparent from the record that appellants had no factual basis to support their complaint charging appellees with conspiring to deprive them of their civil rights. The "heart" of appellants' case was that appellees and others conspired to seize appellants' records. The general allegations of the complaint, standing alone, were insufficient to withstand appellees' motion for summary judgment supported by affidavits which demonstrated beyond all doubt that appellees did not participate in or have any prior knowledge of the seizure of appellants' records or participate in any conspiracy to seize appellants' records or to deprive them of their civil rights. The undisputed affidavits filed by appellees were not "mere naked denials" but were affirmative and detailed statements showing exactly what had occurred. Appellants failed to raise a genuine issue of material fact by way of affidavit or otherwise, to support their charge, as they must do. Rule 56(e), Fed. R. Civ. P. Under these circumstances since there was no genuine issue of material fact, appellees were entitled to judgment as a matter of law.

The District Court did not abuse its discretion by denying appellants' oral motion for a continuance, made during argument on the motion for summary judgment. The oral motion for continuance was based upon counsel's affidavit claiming that a letter in their possession raised issues of fact which needed further discovery. However, counsel's affidavit, predicated upon hearsay and speculation, failed to inform the court why affidavits were unavailable at that time to support their contention that the letter raised a genuine issue of material fact. Moreover, counsel was aware of the letter thirty-four days prior to the hearing on the motion, certainly sufficient time to obtain affidavits or to conduct discovery which would spell out the issue of fact claimed to be created by the letter.

Similarly, the lower court did not abuse its discretion in denying appellants' request for a continuance based upon their proposal to include as part of the record herein, a deposition taken by appellants in the then pending "companion case" in the State of Louisiana. The deposition referred to had been taken by counsel for these appellants approximately two weeks prior to the hearing on appellees' motion for summary judgment. Appellants' counsel therefore knew of the contents of the deposition. Under these circumstances, no reason existed justifying counsel's failure to file with the court their affidavit or affidavits setting forth that part of the deposition or the statements of the deponent which they claim would have created a genuine issue of material fact in the instant case. Appellants' failure to comply with Rule 56(f), Fed. R. Civ. P., negates their contention the lower court abused its discretion.

II

Appellees moved in the alternative to dismiss the complaint on the ground that the legislative immunity doctrine operated as an absolute defense to the claim for relief. Although the District Court did not rule upon appellees' motion to dismiss, and the order granting summary judgment does not rest upon the immunity doctrine, nevertheless that doctrine barring relief against appellees, alternatively supports the ruling of the District Court.

The well settled principle that officials of the legislature,

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while acting within the scope of or in relation to matters lawfully committed to their responsibiliy, are immune from civil liability, applies to appellees herein. At all times pertinent, Senator Eastland was acting as Chairman of the Senate Subcommittee on Internal Security. Mr. Sourwine was acting as the Subcommittee's chief counsel. The Subcommittee's subpoenas were signed by Senator Eastland and served upon the officials of the Louisiana Joint Committee by Mr. Sourwine. Both were acting in their official capacity in respect to matters lawfully committed to their authority. Appellants' assertion that Senator Eastland and Mr. Sourwine conspired with officials of the State of Louisiana to seize the SCEF records, although completely refuted by the record, even if true, in no way dilutes or makes inapplicable the protection afforded appellees by the immunity doctrine.

III

The District Court properly denied appellants' request for preliminary and permanent injunctive relief which sought to bar legislative use of the records involved.

The records of the corporate appellant were in the possession of the Senate Internal Security Subcommittee pursuant to subpoenas *duces tecum* served on October 5, 1963. On November 14, 1963, the SCEF material was incorporated into the Subcommittee's hearing record, by formal resolution of the Subcommittee.

Thus appellants' attempt to enjoin the use of the subpoenaed material was beyond the jurisdiction of the District Court for the reason that the judiciary may not impose restraint upon a lawfully constituted Congressional committee in the conduct of its legislative business.

Aside from the fact that the record before the court at the hearing on the motion for injunctive relief, which was undisputed, conclusively demonstrated that appellees did not at that time, or at any other time, have personal possession of the SCEF material, appellees were not subject to equitable restraint while acting as officials of the Senate Subcommittee and within the scope of their legislative authority. Moreover, since the remaining members of the Subcommittee were not be-

fore the court and subject to its jurisdiction, the court was powerless to enjoin Subcommittee action and to this extent unable to grant appellants any beneficial or effective relief.

ARGUMENT

I. The District Court did not err in granting appellees' motion for summary judgment

Appellants assert in their complaint that appellees Eastland and Sourwine conspired with Colonel Burbank and Major Willie of the Louisiana State Police, Chairman Pfister of the Louisiana Joint Legislative Committee on Un-American Activities and other unnamed persons, to deprive appellants of the rights, privileges and immunities guaranteed to them as citizens of the United States and by the laws and Constitution of the United States.[10]

Appellants summarize their complaint as follows:

> The complaint alleges that appellees Eastland and Sourwine participated in a plan and conspiracy, together with other named defendants, to utilize certain Louisiana state statutes to seize documents, files, membership lists and lists of contributors, in violation of the appellants' federally protected rights under the First, Fourth and Fourteenth Amendments, which material would be otherwise unavailable to appellees under the prohibition of the federal Constitution. *This is a major factual allegation of the complaint.* This is an allegation which gives rise to the federally created cause of action for relief. See *Monroe* v. *Pape* and cases cited *supra.* [Emphasis supplied.] (Appellant's Br. 29).

Distilled to its basic essentials the complaint alleges that appellees conspired with other named and unnamed persons to

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[10] The corporate appellant, SCEF, is not a "citizen" within the privileges and immunities clause of the Fourteenth Amendment, *Hague* v. *C.I.O.*, 307 U.S. 496 (1938); *Orient Ins. Co.* v. *Daggs*, 172 U.S. 557, 561 (1899); but is a "person" within the meaning of that term as used in the due process clause of the Fourteenth Amendment. *Smyth* v. *Ames*, 169 U.S. 466, 522 (1898); *Llan Del Rio Co.* v. *Anderson-Post Hardwood Lumber Co.*, 79 F. Supp. 382 (D.C. La. 1948), *affirmed* 187 F. 2d 235 (5th Cir. 1951). However, since appellees did not raise the distinction between the corporate appellant's constitutional rights and those of the natural appellant, Dombrowski, in the trial court, the issue is not before this Court.

utilize Louisiana law to effect the arrest of appellant, James A. Dombrowski, and to obtain search warrants for Dombrowski's home and automobile and the offices of SCEF. It is further asserted in the complaint that the documents and records seized, in furtherance of the alleged conspiracy were turned over to the United States Senate Internal Security Subcommittee pursuant to a subpoena *duces tecum* issued by the Senate committee after the records were acquired by the Louisiana Joint Committee. Appellants further allege that the issuance of the Senate Subcommittee's subpoena *duces tecum* was part of the alleged conspiracy to seize the records of SCEF (J.A. 6a).[11] Significantly these allegations were made only upon information and belief.

In response to appellants' complaint, appellees Eastland and Sourwine filed, on January 28, 1964, a motion to Dismiss or in the alternative for Summary Judgment (J.A. 15a). Incorporated in the motion for summary judgment and as part thereof were the affidavits of appellees, earlier filed in the cause, and the affidavits of Colonel Burbank, Major Willie, Chairman Pfister, the other individually named conspirators and Jack N. Rogers, counsel for the Joint Committee were attached as exhibits to the motion. On February 10, 1964, appellants filed an opposition [12] to appellees' motion to which they attached the affidavits of appellant Dombrowski and Benjamin E. Smith, an officer of SCEF.

a. The pleadings, affidavits, and depositions filed below, demonstrate without contradiction that Senator Eastland and Mr. Sourwine did not participate in a conspiracy to deprive appellants of their civil or constitutional rights

In view of the ease with which an unsupported allegation of conspiracy can be made, the law has developed the salutory

[11] It is significant to note that although appellants allege in their complaint that the affidavits sworn to for the purpose of obtaining the arrest warrants and search warrants contained "false and untrue" allegations, "wholly without probable cause" they nevertheless concede that these "warrants were issued on October 2, 1962 (3) by Judge Thomas Brahney, Jr., of the Section 'D' of the Criminal District Court for the Parish of Orleans" (J.A. 4a). Appellants did not name Judge Brahney as a conspirator nor do they charge him with any wrongdoing.

[12] Appellants filed no statement of genuine issues as required by Rule 9h, Rules of the District Court.

requirement that conspiracy must be pleaded with particularity.[13] A general allegation of conspiracy, without a statement of facts supporting the allegation, is no more than a legal conclusion which is insufficient to found a cause of action. *McCleneghan* v. *Union Stock Yards Co. of Omaha*, 298 F. 2d 659 (8th Cir. 1962); *Nelson Radio and Supply Co.* v. *Motorola*, 200 F. 2d 911, 912–914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925; *Riley* v. *Titus*, 89 U.S. App. D.C. 79, 190 F. 2d 653 (1951); *Connor* v. *Real Title Corp.*, 165 F. 2d 291 (4th Cir. 1947); *Black & Yates* v. *Mahogany Ass'n.*, 129 F. 2d 227, 231 (3rd Cir. 1941), *cert. denied*, 317 U.S. 672; *New York, N.H. & H. R. Co.* v. *New England Forwarding Co.*, 119 F. Supp. 380 (D.C.R.I. 1953).

It is against the background of this well established judicial principle that the record below must be analyzed. The complaint itself contains the bald allegation that appellees conspired with the Louisiana authorities to deprive appellants of their civil rights. This general allegation, standing alone, is insufficient to withstand a properly supported motion for summary judgment. Judicial authority in this regard is uniform. In *Marion County Cooperative Ass'n* v. *Carnation Co.*, 214 F. 2d 557 (8th Cir. 1954), the court stated:

> Against this showing by defendant that it had paid the usual and normal price for milk during the period alleged in the complaint, plaintiff offered nothing to rebut or contradict defendant's evidence or to affirmatively establish the allegations of the complaint. It chose to rest upon the broad charge that defendant had paid a "ficticious" price, or a price in excess of the usual and normal price for milk and thereby "run a corner" on the market. It is clear that no genuine issue of material fact existed as to any of the facts stated in the affidavits or depositions. The question, therefore, resolves itself to this: *Is a general allegation in a com-*

[13] "In a civil conspiracy, the conspiracy itself is not a cause of action, without overt acts, because again it is the overt act which moves the conspiracy from the area of thought and conversation into action and causes the civil injury and resulting damage. Accordingly, the cases hold that the damage in a civil conspiracy flows from the overt acts and not the conspiracy". *Hoffman* v. *Halden*, 268 F. 2d 280, 295 (9th Cir. 1959), *overruled on different grounds, Cohen* v. *Norris*, 300 F. 2d 24 (9th Cir. 1962).

> *plaint, standing alone, sufficient to withstand a motion for summary judgment supported by a prima facie showing that no* genuine issue of material fact exists?
>
> Courts, including our own, which have considered this question have uniformly answered it in the negative. * * * [Emphasis supplied.]

Similarly, in this jurisdiction a general allegation of arbitrary and unlawful action by a governmental official was held insufficient to survive a properly supported motion for summary judgment. See *Riley* v. *Titus, supra,* where it was held:

> * * * For the most part, however, her complaint describes their action in only general and conclusionary terms as "arbitrary" and "unlawful". No factual allegations emerge from her voluminous pleadings and affidavits with sufficient clarity to show a basis for recovery. * * * At the most there are only remote references to a "conspiracy" and "threats" by two persons who were her superiors at different times in different states. In a parallel situation this Court has stated, "Though it [the complaint] characterized appellees' alleged conduct as wrongful, unlawful, and malicious, it does not sufficiently disclose the conduct to enable a court to judge whether or not it was tortious". *Burns* v. *Spiller,* 1947, 82 U.S. App. D.C. 91, 161 F. 2d 377 *cert. denied,* 1947, 332 U.S. 792. * * *. In that case the complaint was dismissed for failure to state a claim upon which relief could be granted; there appearing no issue as to any material fact, the granting of summary judgment was proper in regard to this aspect of appellant's case for the same reason. *Id.* at 80–81.

See also, *Richardson* v. *Rivers,* No. 18,169, decided July 9, 1964; *Farley* v. *Abbetmeier,* 72 U.S. App. D.C. 260, 114 F. 2d 569, 572–573 (1940); *Burton* v. *United States,* 139 F. Supp. 121 (DC Utah 1956).

A careful review of the complaint discloses that it is predicated only upon information and belief. Moreover, the verification of the complaint was made, not by the natural appellant, but rather by local counsel who merely declared he "verily

believes [it] to be true".[14] Nowhere is it discerned that appellants, in the complaint, have set forth on the basis of personal knowledge a single, substantial material fact[15] which would lend credence to the allegation that appellees participated in the charge of conspiracy.

Moreover, the affidavits attached to appellants' opposition to the motion for summary judgment add nothing to support the allegations in the complaint relating to the appellees. The affidavits of appellant Dombrowski (J.A. 20a) and Benjamin E. Smith (J.A. 26a) relate first, to the activities and alleged aims and purposes of SCEF and second, to a description of the conduct of the Louisiana police authorities who executed the search and seizure of the SCEF records and effected appellant's arrest on October 4, 1963. The affidavits finally recite the subsequent attempts of SCEF to enjoin the removal of the subpoenaed records from the State of Louisiana. These affidavits fail to touch upon, directly or indirectly, any of the allegations contained in the complaint relating to Senator Eastland or Mr. Sourwine which charge them to be members of a conspiracy against appellants. Even more important, they do not in any way contradict the affidavits filed by appellees in support of their motion.

In contrast, the affidavits filed by appellees in support of their motion for summary judgment, including affidavits from each of the alleged conspirators, conclusively negate appellants' assertion that Senator Eastland and Mr. Sourwine conspired with the Louisiana police authorities to seize the records of SCEF. The affidavits show as a fact that neither Senator Eastland nor Mr. Sourwine had prior knowledge of, or any part in, the search and seizure that resulted in the acquisition of the records of SCEF by the Louisiana authorities, from whom they were later subpoenaed by the Senate Internal Security Subcommittee. Similarly, the exhibits conclusively demonstrate that Senator Eastland and Mr. Sourwine had nothing to do with the arrest of appellant Dombrowski, and they did not participate in any

[14] See footnote 21, *infra*.

[15] See Rule 56(e), F.R. Civ. P. which holds that after a motion for summary judgment is filed, an adverse party may not rest upon the mere allegations of his complaint.

plan or conspiracy, as alleged in the complaint or otherwise to deprive appellants of any rights, privileges or immunities. The affidavits of the Louisiana authorities recite in detail the facts and circumstances leading up to and surrounding the acquisition of the SCEF records and the arrest of appellant Dombrowski by the Louisiana police, and the subsequent acquisition of the records by the Senate Internal Security Subcommittee, pursuant to its subpoenas *duces tecum*. Appellants' statements that the affidavits are "naked denials" * * * "made to the major allegations of fact contained in the verified [16] complaint" (Appellants' Br. 29), offends reason. To the contrary, the detailed statements of facts, set forth in the affidavits, show conclusively that what appellants themselves have asserted as the "heart" of their cause of action is completely lacking.[17]

Specifically, the affidavits filed by appellees show that beginning in 1962, the Joint Legislative Committee on Un-American Activities for the State of Louisiana conducted an investigation of SCEF (J.A. 67a). Previously, in 1955, the Internal Security Subcommittee of the United States Senate had published a report after an investigation of SCEF and its parent organization, the Southern Conference for Human Welfare (J.A. 42a–43a). In the course of his investigation, the general counsel of the Louisiana Committee, Mr. Jack N. Rogers, asked the general counsel of the Senate Subcommittee, Mr. Sourwine, to furnish the Louisiana Committee with such information as the Subcommittee could properly give relating to SCEF (J.A. 44a, 77a). Accordingly, Mr. Sourwine did furnish Mr. Rogers certain relevant information from the public records of the Subcommittee, bearing upon the activities of SCEF (J.A. 44a, 77a). This request and transfer of information occurred sometime in

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[16] See footnote 21, *infra*.

[17] In their memorandum of points and authorities in opposition to the motion for summary judgment, appellants stated:

* * * * *

* * * The cause of action, insofar as it relates to defendants Eastland and Sourwine, charges that these individuals, together with the other named defendants, participated in a plan or conspiracy to utilize the laws of the State of Louisiana to deprive the plaintiffs of rights, privileges or immunities secured by the federal Constitution and federal law. *This is the heart of the action.* (p. 4)

July, 1963 (J.A. 77a). At that time, Mr. Rogers advised Mr. Sourwine that at some future date the Louisiana Joint Committee might subpoena the records of SCEF and that if this were done, any material subpoenaed that might relate to the responsibilities of the Senate Internal Security Subcommittee would be brought to the attention of Mr. Sourwine (J.A. 44a, 47a).[18] Sometime in August or September, 1963, Mr. Rogers telephoned Mr. Sourwine and asked whether he and Mr. Mandel, Research Director of the Senate Subcommittee, could possibly come to Louisiana to help him evaluate the material contained in the SCEF records, in the event the Joint Committee of Louisiana Legislature subpoenaed such records (J.A. 79a). Mr. Sourwine discussed the request of the Joint Committee with Senator Eastland chairman of the Subcommittee, who advised Mr. Sourwine that his judgment would have to be based upon what was found in the records by the Louisiana Joint Committee; and that if the material should appear to be within the scope of the Senate Subcommittee's investigative authority, then Mr. Sourwine and Mr. Mandel might go to Louisiana to look at them (J.A. 44a–45a). Senator Eastland emphasized to Mr. Sourwine that the Senate Subcommittee was only interested in material relating to Communists or Communist front activities, especially Communist infiltration of mass organizations and the financing of Communist fronts; that the Subcommittee had no interest in activities relating solely to civil rights or racial matters (J.A. 45a, Sourwine deposition p. 27). Senator Eastland and Mr. Sourwine heard no more from Mr. Rogers until October 4, 1963, when Mr. Rogers advised Mr. Sourwine by telephone that the Louisiana Committee had the SCEF records in its custody under subpoena, and that the material would be of great interest to the Senate Internal Security Subcommittee. Mr. Rogers urged Mr. Sourwine to come to Louisiana as soon as possible and assist them in the evaluation of the seized records (J.A. 65a, 78a–79a). Mr. Sourwine and Mr. Mandel went to Louisiana the following day, October 5, 1963, and examined some of the records then in the custody of the Louisiana Committee and they concluded that the records

[18] See footnote 6, *supra*.

of SCEF would, in fact, be of interest to the Senate Internal Security Subcommittee in pursuance of its proper investigative functions (J.A. 45a). Upon his arrival in Louisiana, Mr. Sourwine learned, for the first time, that the records had been subpoenaed by the Louisiana Committee after they had been seized by Louisiana police pursuant to search warrants (J.A. 52a). After concluding that the SCEF records would be of interest to the Senate Subcommittee, Mr. Sourwine contacted Senator Eastland who authorized Mr. Sourwine to serve subpoenas *duces tecum* upon the Louisiana Committee, calling for the production before the Senate Internal Security Subcommittee of all the SCEF material in the possession of the Louisiana Committee (J.A. 45a–46a). The material was subsequently brought to the District of Columbia for study and evaluation by the Senate Internal Security Subcommittee.[19]

The affidavits filed by appellees in support of their motion and the deposition of Mr. Sourwine, taken by appellants, show further that shortly before the SCEF records were acquired by the Louisiana authorities, Mr. Rogers and the Louisiana committee had concluded, upon the basis of the committee investigation, that SCEF and its officers were operating in violation of a Louisiana criminal statute; and it was therefore determined by the Louisiana authorities that they would proceed by way of arrest and search warrants rather than by way of subpoena, in seeking the records of SCEF (J.A. 52a, 77a, 80a). Senator Eastland and Mr. Sourwine knew nothing of this decision, were not consulted about it, and had nothing to do with the resulting seizures and arrests (J.A. 40a, 47a, 68a, 80a, 87a,). In fact, Mr. Sourwine and Senator Eastland believed at all times prior to October 4, 1963, that if the Louisiana authorities acquired the records of SCEF they would do so pursuant to a subponea *duces tecum* served upon the officers of SCEF

[19] On November 14, 1963, the Internal Security Subcommittee formally considered the matter of evaluation and disposition of the subpoenaed material and approved a resolution ordering that all the SCEF material be placed in the Subcommittee's record by reference and that a task force of five Senators undertake the work of evaluating the material to determine which items should be placed in the record verbatim. A copy of the resolution is attached to the affidavit of Senator Eastland, dated December 4, 1963 (J.A. 40a). Appellants' motion for a Preliminary injunction was heard on December 18, 1963. At that time the foregoing action had already been taken.

(J.A. 44a, 52a). It is thus manifest from the affidavits filed in support of the Motion for Summary Judgment reciting in detail the manner in which the Senate Subcommittee acquired the SCEF records, that Senator Eastland and Mr. Sourwine took no part in any alleged conspiracy or plan to deprive appellants of their civil rights. The concerted action alleged in the complaint simply did not take place.

The affidavits filed by appellants fail to traverse any one statement of fact contained in the affidavits filed by appellees, which affirmatively show that the actions of Senator Eastland and Mr. Sourwine were both innocent and proper. Not one fact, not one single circumstance has been shown which bears out the allegations in the complaint.

Clearly in this posture no geniune issue of material fact existed. Neither the complaint nor the affidavits of appellant Dombrowski and Benjamin E. Smith sufficiently establish the existence of a material disputed fact as required by Rule 56(e) Federal Rules of Civil Procedure, as amended January 21, 1963, effective July 1 1963,[20] which provides as follows:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would

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[20] The Advisor's notes to the recent amendment of Rule 56(e) are particularly pertinent to appellees' argument that summary judgment was properly granted.

"The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment devise.

"A typical case is as follows: A party supports his motion for Summary Judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adversary party, in opposing the motion does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are "well pleaded" and not suppositious, conclusionary or ultimate. [Citations omitted.]

"The very mission of the Summary Judgment procedures is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting Summary Judgment, is incompatible with the basic purpose of the rule." [Citations omitted.]

* * * * *

> be admissible in evidence, and shall show affimatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

No weight is added to the complaint by counsel's verification that he "has read the foregoing complaint by him subscribed, that he knows the contents thereof and that the matters and things therein stated he verily believes to be true" (Complaint, p. 14).[21] Such verification does not satisfy the requirement of Rule 56(e) Fed. R. Civ. P., that on a motion for summary judgment "supporting and opposing affidavits shall be made on personal knowledge * * * and shall show affirmatively that the affiant is competent to testify to the matters stated therein". *F. S. Bowen Electric Co.* v. *J. D. Edin Construction Co.*, 114 U.S. App. D.C. 361 F. 2d 362 (1963); *Jameson* v. *Jameson*, 85 U.S. App. D.C. 176, F. 2d 58 (1949); *Mercantile National Bank at Dallas* v. *Franklin Life Ins. Co.*, 248 F. 2d 57 (5th Cir. 1957); *Automatic Radio Manu-*

[21] Any weight that might attach to such verification is severly weakened when consideration is given to counsel's admission that "[t]he information contained in that complaint came to me from three sources, actually four sources: primarily through the law offices of Kunstler, Kunstler and Kinoy * * *. I received a call from William Kunstler an attorney known by me and with whom I have worked closely for many years on other cases, and he related to me many of the facts contained in the complaint.

And I also received two affidavits, one which is part of the record in the case, one from Mr. Dombrowski and one from Mr. Brener.

And on the basis of that I verified—I stated an opinion that I believed the facts to be true." (J.A. 104a).

facturing Co. v. *Hazeltine Research Inc.*, 339 U.S. 827, *reh. den.* 30 U.S. 846 (1950).

It is well established that summary judgment should be granted even though the pleadings formally raise an issue, when the supporting affidavits and the opposing affidavits show that there exists no geniune issue of material fact. *Algar* v. *Yellow Cab Co.*, 103 U.S. App. D.C. 129, 255 F. 2d 538 (1958); *Bruce Construction Co.* v. *United States for the use of Westinghouse*, 342 F. 2d 873 (5th Cir. 1957); *Riley* v. *Titus*, 89 U.S. App. D.C. 79, 190 F. 2d 653 (1951); *Orvis* v. *Brickman*, 95 F. Supp. 605 (D.C.D.C. 1951), *affirmed*, 90 U.S. App. D.C. 266, 196 F. 2d 762 (1952). Interpreting the recent amendment to Rule 56, F.R. Civ. P. the Court of Appeals for the Second Circuit stated: "A detailed affidavit categorically denying the existence of a conspiracy was sufficient to require plaintiff to set forth specific facts under the recent amendments". *Scolnick* v. *Lefkowitz*, 329 F. 2d 716 (2d Cir. 1964). Furthermore, a party opposing a motion for summary judgment cannot hold back his evidence until trial; he must present sufficient material to show that a triable issue actually exists. *Ring Engineering Co.* v. *Otis Elevator Co.*, 86 U.S. App. D.C. 411, 179 F. 2d 812 (1950).

The situation in the instant case parallels that in *Orvis* v. *Brickman, supra.* That case involved an action for false imprisonment against the superintendent of Gallinger Hospital and the head of the psychiatric department of the hospital. In support of their motion for summary judgment, the defendants filed affidavits disclaiming knowledge of the plaintiff's presence at the hospital prior to the receipt of a court order committing her. The plaintiff did not file any affidavit disputing this disclaimer. The District Court granted the motion for summary judgment and stated:

> Knowledge on the part of the defendants Sweeny and Gilbert of plaintiff's presence at the hospital prior to receipt of the court order committing her, is an essential element of plaintiff's case against them. A categorical disclaimer of such knowledge has been made by the defendants * * * in their affidavits, which remain unchallenged.
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> * * * * *

> All the plaintiff has in this case is the hope that on cross-examination [I assume by calling them as hostile witnesses under Rule 43(b), Fed. Rules Civ. Proc. 28 U.S.C.A.] the defendants * * * will contradict their respective affidavits. This is purely speculative, and to permit trial on such basis would nullify the purpose of Rule 56, which provides summary as a means of putting an end to useless and expensive litigation and permitting expeditious disposal of cases in which there is no genuine issue as to any material fact.
>
> According to judicial pronouncements, the test for determining whether summary judgment should be granted is whether a motion for directed verdict should be granted if the same state of facts existed at the conclusion of plaintiff's case. *Dewey* v. *Clark, supra.* 95 F. Supp. 606, 607.

See also *Dewey* v. *Clark,* 86 U.S. App. D.C. 137, 180 F. 2d 66 (1954); *United States* v. *Lot in Square 1928,* 169 F. Supp. 904 (D.C.D.C. 1959). In the latter case the court noted that:

> Defendants also resist the plantiff's motion for summary judgment by asserting in both of its memoranda of points and authorities that certain genuine issues of material fact exist in this litigation. The fact issues claimed to exist are not properly set forth in the answer or by means of affidavit but are merely listed at page 7 of both of defendants' memoranda. Furthermore, this list does not consist of specific allegations or statements of fact but rather they are merely speculative questions as to what procedures might or might not have been followed by the Commission in instituting this action. By reason of their source and their nature, these questions do not form a sound basis for determining that a genuine issue of material fact exists in this case. *Id.* at 908.

Similarly, in *Jones* v. *Honaker Drilling Company,* 254 F. 2d 702 (10th Cir. 1958), the court held that:

> * * * where the moving party presents affidavits, or depositions, or both, which taken alone would entitle him to a directed verdict, if believed, and which the opposite party does not discredit as dishonest, it rests upon that

> party at least to specify some opposing evidence that he can adduce which may reasonably change the result. *Id.* at 706.

Appellants herein failed to show by affidavit or deposition, one fact or circumstance that negated appellees total disclaimer of participation in the alleged conspiracy.

Appellants also contend that *Shelton* v. *United States,* —— U.S. App. D.C. ——, 327 F. 2d 601 (1963), precluded the District Court from granting summary judgment because this Court in *Shelton* held that a subpoena issued by the Chairman of the Senate Internal Security Subcommittee was invalid absent consideration by the full subcommittee. Therefore, appellants argue, a genuine issue of fact is raised. What appellants completely ignore is that for the purpose of determining whether to grant or deny appellees' motion for summary judgment, the question of full Subcommittee authorization for the subpoena *duces tecum* served by appellee Sourwine upon the Louisiana Joint Committee, is wholly immaterial. Appellants seek to becloud the true issues presented in their complaint; issues that they summarize as follows:

> The heart of the matter is that the complaint here charges that these defendants, Eastland and Sourwine, acting under color of Louisiana state law, met with, planned and conspired with other defendants also here named, to deprive the plaintiffs of federally protected, constitutional rights. (Answer to Defendant's motion for Summary Judgment or in the alternative to Dismiss, p. 8).

The gravamen of the complaint is that appellees Eastland and Sourwine, schemed and conspired with the other named defendants to deprive appellants of their Civil Rights by the seizure of their records pursuant to state warrants; the issue was not whether the Chairman of the Senate Subcommittee, Senator Eastland, was authorized to issue a subpoena *duces tecum* without prior approval of the full subcommittee. Even assuming *arguendo* that issuance of the subpoenas *duces tecum* by Senator Eastland and Mr. Sourwine were without Subcommittee approval and to this extent improper, this would not sustain

the assertion that the action was taken pursuant to the alleged conspiracy. *Shelton* v. *United States, supra,* was a contempt of Congress case where this Court held the Senate Internal Security Subcommittee had failed to comply with its own rules in issuing a subpoena. Failure to comply with the technical rules governing issuance of a subpoena falls far short of constituting evidence of a conspiratorial act and this is particularly true in the face of the overwhelming evidence which proves the contrary. In short, the validity of the subpoenas without more, is without probative value. This is all the more obvious in light of the fact that the record herein establishes that the action taken by Senator Eastland and Mr. Sourwine complied with the long established practice of the Subcommittee which had not been questioned prior to the *Shelton* case. All that appellants have done in an effort to further their charge is to make a bare allegation in the complaint. No triable issues were presented to the District Court, thus appellees' motion for summary judgment was properly granted. *Cf. Richardson* v. *Rivers, supra.* As Judge Sirica aptly stated in granting appellees' motion for summary judgment, "the case does not rise above suspicion" and "should not even have been brought to this Court."

b. The District Court did not abuse its discretion in denying appellants' request for a continuance of the hearing on appellees' motion for summary judgment

We observe initially that a motion for a continuance of the hearing on a motion for summary judgment is addressed to the sound discretion of the trial court and a party opposing a motion for summary judgment must act diligently and in good faith. *Chung Wing Ping.* v. *Kennedy,* 111 U.S. App. D.C. 106, 294 F. 2d 735 (1961); *Surkin* v. *Charteris,* 197 F. 2d 77 (5th Cir. 1952); *Columbia Fire Ins. Co.* v. *Boykin & Tayloe,* 185 F. 2d 771 (4th Cir. 1950).

Appellants maintain that the trial court abused its discretion in denying their requests for a continuance of the hearing on appellees' motion for summary judgment. They assert that they requested a continuance on two occasions.

Appellants argue that attached to their opposition to the motion for summary judgment was an affidavit of counsel, dated

February 18, 1964—three weeks prior to the hearing on the motion—advising the trial court that on February 7, 1964, counsel became aware of a letter from Senator Keating to appellee Eastland. Appended to the affidavit was a newspaper clipping from the New Orleans Times Picayune, published February 6, 1964, stating that Senator Keating had protested the Senate Subcommittee's action of subpoenaing the records of SCEF. Aside from the fact that counsel for appellants had from February 7, 1964, to March 12, 1964, the date of the hearing, to develop an issue of fact on the basis of Senator Keating's alleged comment, the newspaper article is blatant hearsay and inadmissible. *Elasky* v. *Pennsylvania R.R. Co.*, 215 F. Supp. 25 (D.C.N.D. Ohio, 1962). Even assuming that the article was otherwise admissible nothing contained therein touches upon the alleged conspiracy and it is therefore wholly irrelevant.[22]

More fundamentally, appellees submit that appellants did not request a continuance in their opposition to the motion. What appellants now claim was a request for a continuance in the "formal" opposition to appellees' motion, is found in a footnote to their opposition (fn., page 16, Plaintiffs' Answer to Defendants' Motion for Summary Judgment). The footnote states:

> *At a minimum, under Rule 57, subdivision (f), this Court must refuse the application for summary judgment or order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had. Rule 56(f) states as follows:
>
> * * * * *
>
> Plaintiffs have invoked subdivision (f) of Rule 56 on the basis of the very recent article in the *New Orleans Times Picayune* discussed above.

The District Court was not required to treat this footnote as a request for a continuance. Nothing contained in the footnote or counsel's affidavit advised the court what facts

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essential to appellants' opposition they sought to discover, or the period of time needed or the purpose of the continuance. See Rule 56(f) FRCP. Further appellants' argument is made even more implausible by the fact that at the time appellants filed their opposition to the motion—February 10, 1964—a date had not been set for the hearing on the motion.

Appellees do not dispute that on March 12, 1964, the day of the hearing on the motion for summary judgment, appellants requested a continuance of the motions judge. The District Court properly denied the request.

The basis for this request of March 12 was two affidavits of Mr. Kinoy, one of appellants' counsel (J.A. 32a, 34a). The first affidavit, sworn to on March 10, 1964 (J.A. 32a), informed the court that a letter "recently" came to counsel's attention (thirty-four days previously) that would create a genuine issue of fact because the latter related appellees' assertion that the subponeas *duces tecum* issued by the Chairman of the Senate Subcommittee, were authorized. This letter from Senator Keating to Senator Eastland was specifically referred to in Mr. Kinoy's affidavit of February 18, 1964 (J.A. 30a), discussed above. Appellees' argument that the newspaper article reporting the initial transmission of the letter, was hearsay and inadmissible is equally applicable to a copy of the actual letter. If Senator Keating possessed information that supported appellants' charge of conspiracy, appellants had ample time (34 days) to obtain an affidavit from Senator Keating or take his deposition. No reason was advanced to the court showing why neither of these steps had been taken. See Rule 56(f) Fed. Rules of Civ. Proc.

Furthermore, appellees submit that a letter from Senator Keating to Senator Eastland expressing his concern at not being advised of the action taken by the Subcommittee, written approximately four months after the issuance of the subpoenas *duces tecum* and more than two months after the Subcommittee, of which he was a member, approved a resolution incorporating the subpoenaed material into the hearing record, is both irrelevant and conclusionary. *Cf. Richardson* v. *Rivers, supra.*

Finally appellants suggest that a second affidavit sworn to by Mr. Kinoy on March 11, 1964, and offered to the court on March 12, 1964, the day of the hearing, required the court to grant the requested continuance. This affidavit informed the court that affiant, Mr. Kinoy was informed on March 11, 1964, by Mr. Brener of New Orleans, Louisiana, that the deposition of James H. Pfister, Chairman of the Louisiana Joint Committee, and a named conspirator in the instant suit, which had been taken on February 26, 1964, in a "companion" case filed in the State of Louisiana "has now been typed and can be made available in a few days" (J.A. 34a, 35a). Mr. Kinoy requested a continuance to include the deposition of Chairman Pfister in the instant case because it was "highly relevant to the pending motion for summary judgment and to the question of the existence of controverted material facts." Mr. Kinoy further advised the court that:

> Counsel believes that this deposition of defendant Pfister would be relevant and material to the pending motions and that pursuant to Rule 56, subdivision (f) the Court should either deny the motions or order a necessary continuance.

For appellants to argue to this Court that the District judge abused his discretion in denying their request for a continuance on the basis of this affidavit does violence to the most liberal interpretation of Rule 56(f) Fed. Rules of Civ. Proc., which provides in pertinent part:

> (f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition * * * the court may order a continuance * * *.

Mr. Kinoy claimed that the deposition of Chairman Pfister contained relevant and material information pertaining to appellees' motion for summary judgment. According to Mr. Kinoy this information was given to him by Mr. Brener of New Orleans, Louisiana. However, Mr. Kinoy is one of appellants' counsel in the instant case as is Mr. Brener. (In fact, it was Mr. Brener who took Mr. Sourwine's deposition in the

instant case (J.A. 49–65).) Mr. Brener is also counsel in the 'companion' case filed in Louisiana. If in fact the deposition of Chairman Pfister contained relevant and material information so as to raise an issue of material fact Mr. Brener clearly had knowledge of the information since February 26, 1964 and could have so advised the court by way of affidavit. To suggest that an affidavit to this effect was unavailable as required by Rule 56(f), is ludicrous.

II. Assuming arguendo the existence of a conspiracy to deprive appellants of their rights, privileges and immunities granted them under the laws and Constitution of the United States, appellees are immune from civil liability under the Civil Rights Statutes for acts taken by them within the scope and authority of their offices

In the District Court appellees moved on an alternate ground for dismissal of the action for failure to state a claim upon which relief could be granted. Appellees' motion for summary judgment sought dismissal of the action on the ground that the pleadings, affidavits, exhibits and depositions filed below conclusively showed that appellees were entitled to judgment as a matter of law. See Argument I, *infra*. Appellees' motion to dismiss sought dismissal of the complaint on the ground that the doctrine of legislative immunity afforded appellees complete immunity for their alleged acts. Although the District Court did not rule upon the motion to dismiss [23] appellees submit that the court could have properly granted the motion.

Supervening considerations of public policy have led the courts to fashion a doctrine of absolute immunity to protect officers of the legislative, executive and judicial branches of the government who exercise judgment and discretion "in line of official duty" from all threat of vexatious or fictitious suits alleging personal liability for acts done by them in the course of their official responsibilities. *Gregoire* v. *Biddle*, 177 F. 2d

[23] Contrary to appellants' assertion that the trial court based its ruling "upon a fundamentally erroneous concept of the doctrine of legislative immunity." (Appellants Br. 13), the trial court did not reach appellees' motion to dismiss wherein they raised the defense of legislative immunity and that doctrine was not a factor in the court's ruling.

579 (2d Cir. 1949); *DeArnaud* v. *Ainsworth*, 24 App. D.C. 167 (1904). Under the currently controlling authorities[24] this doctrine absolutely bars the maintenance of suits in tort or a suit such as appellants have brought here, on a claim of alleged "conspiracy" for acts done by appellees as federal officers and members of the legislature.

The legal principles of immunity of judges, legislators and executive officers from liability for acts done by them in the course of their official functions is so well settled that appellees will not burden the Court with an extensive argument of what might now be appropriately termed "Hornbook" law. The courts have been led to extend this doctrine, that was limited in its formative years to senior officials, to protect both high and lesser officers, upon this essential public policy consideration.[25]

The reason for the well established privilege was cogently given by Judge Learned Hand in *Gregoire* v. *Biddle, supra,* when he stated:

> [T]o submit all officials, the innocent as well as the guilty to the burden of trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible in the unflinching discharge of their duties. * * * [I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. *Id.* at 581.

In *Cooper* v. *O'Connor* 69 App. D.C. 100, 99 F .2d 135 (1938); *cert. denied,* 305 U.S. 642, *reh. denied,* 307 U.S. 651, an action was instituted for malicious prosecution against officers and lesser employees of the United States, in their individual capa-

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[24] *Bradley* v. *Fisher*, 13 Wall. 335, 20 L. Ed. 646; *Spalding* v. *Vilas*, 161 U.S. 483 (1896); *Barr* v. *Mateo*, 360 U.S. 564 (1958); *Yaselli* v. *Goff*, 12 F. 2d 396 (2d Cir. 1926), aff'd, 275 U.S. 503; *Cooper* v. *O'Conner*, 69 App. D.C. 100, 99 F. 2d 135 (1938); *cert. denied*, 305 U.S. 642, *reh. denied*, 307 U.S. 651; *Laughlin* v. *Rosenman*, 82 U.S. App. D.C. 164, 163 F. 2d 838 (1947); *Papagianakis* v. *The Samoa*, 186 F. 2d 257 (4th Cir. 1950); *Bershad* v. *Wood*, 290 F. 2d 714 (9th Cir. 1961); *Brownfield* v. *Landon*, 113 U.S. App. D.C. 248, 307 F. 2d 389 (1962).

[25] *Agnew* v. *Moody*, 330 F. 2d 868 (9th Cir. 1964); *Hartline v. Clary*, 141 F. Supp. 151 (D.C.E.D. S.C. 1956).

cities. This Court's opinion reflects that it was cognizant of the general extension of the rule of immunity to lesser public officials, notwithstanding that such extension might "too greatly imperil the rights of the individual citizen." The Court also held that the motive with which individual acts are performed is immaterial; and in defining the scope of official authority, the Court said it is not necessary that the acts done be prescribed by statute, or even that they should be specifically directed or requested by a superior officer. "It is sufficient, if they are done by an officer, '*in relation* to matters committed by law to his control or supervision;' * * * or that they have more or less connection with the general matters committed by law to his control or supervision; * * *." Citations omitted *Id.* at 104. See also *Kilbourn* v. *Thompson,* 103 U.S. 168, 203 (1880); *Barr* v. *Matteo, supra.*

Contrary to appellants' assertion, both Senator Eastland and Mr. Sourwine were acting "in relation" to matters lawfully committed to their legislative responsibiliy. Senator Eastland is Chairman of the Senate Internal Security Subcommittee and Mr. Sourwine is the Subcommittee's chief counsel. The authority and purposes of the Senate Subcommittee as stated in Senate Resolution No. 62 and set forth in the affidavit of Mr. Sourwine (J.A. 42a) relate to espionage, sabotage, the protection of the internal security of the United States and subversive activities. The action of Senator Eastland in authorizing Mr. Sourwine to serve the subpoenas *duces tecum* upon the Louisiana Legislative Committee after Mr. Sourwine had determined that the records of SCEF would be of interest to the Senate Subcommittee, and the service of the subpoenas by Mr. Sourwine were clearly within the scope of their respective legislative authority to conduct investigations.[26] Appellants cannot and do not suggest that Congress, in enacting the Civil Rights Statutes, abrogated the immunity enjoyed by legislators for acts performed within the scope of their official duties, whether activated by malice or otherwise; an immunity that

[26] *Shelton* v. *United States, supra,* does not require a different interpretation. *Shelton* was decided subsequent to the issuance of the subpoenas herein and further nothing in *Shelton* can be construed to require appellees to respond in damages for failure to obtain prior authorization for the issuance of the subpoenas *duces tecum.* See also *Wheedlin* v. *Wheeler,* 372 U.S. 647 (1963).

has its roots in early common law. *Kilbourn* v. *Thompson, supra; Tenney* v. *Brandhove,* 341 U.S. 367 (1951).

Tenney v. *Brandhove, supra,* which appellees submit is controlling with respect to their defense of legislative immunity, involved a suit against members of the California Legislature alleging that they conspired to deprive petitioner of rights guaranteed him by the Federal Constitution. After Justice Frankfurter had reviewed the long and historic struggle of the English Parliament to secure the privilege of freedom from arrest and civil process for things said and done during the course of legislative proceedings and the subsequent adoption by early American legislative bodies of that principle, Mr. Justice Frankfurter posed this rhetorical question:

> Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity? *Id.* at 376.

Replying to his own question, and speaking for the Court, he answered:

> We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us. *Id.* at 376.

The Court went on to state that a claim of an unworthy purpose does not destroy the privilege of immunity, and taking note that legislative committees have been accused of losing sight of their duty of disinterestedness, the Court stated that the voters, and not the courts, are charged with the responsibility of discouraging and correcting such abuses.

Since the date of the Supreme Court's decision in *Tenney,* the Federal courts have uniformly held that the Civil Rights Statutes do not impair the traditional common law immunity of legislators and judges from personal liability in damages for their official acts. *Agnew* v. *Moody,* 330 F. 2d 868 (9th Cir. 1964); *Hurlburt* v. *Graham,* 323 F. 2d 723 (6th Cir. 1963); *Kostal* v. *Stoner,* 292 F. 2d 492 (10th Cir. 1961), *cert. denied,* 369 U.S. 868, *reh. denied,* 370 U.S. 920; *Kenney* v. *Fox,* 223 F.

2d 782 (8th Cir. 1956); *Phillips* v. *Nash*, 311 F. 2d 513 (7th Cir. 1962); *Morgan* v. *Sylvester*, 125 F. Supp. 380 (S.D.N.Y. 1954), *affirmed*, 220 F. 2d 758 (2d Cir. 1955), *cert. denied*, 350 U.S. 867; *Francis* v. *Crafts*, 203 F. 2d 809 (1st Cir. 1953). With respect to the effect of the Civil Rights Statutes upon the traditional immunity doctrine, Judge Magruder, concurring in *Cobb* v. *City of Malden*, 202 F. 2d 701 (1st Cir. 1953) although initially troubled by the apparent breadth of 42 U.S.C. 1983, stated:

> * * * the Act, if read literally, created a new federal tort, where all that has to be proved is that the defendants as a result of the conduct under color of state law have in fact caused harm to the plaintiff by depriving him of rights, etc., secured by the Constitution of the United States.
>
> Fortunately, *Tenney* v. *Brandhove*, * * *, has relieved us of the necessity of giving the Civil Rights Act such an awesome and unqualified interpretation. Id. at 706.

Thus, appellants' argument that appellees were not acting within the scope of their legislative authority and that the doctrine of legislative immunity is not a valid defense to an allegation of conspiracy under the Civil Rights Act is untenable. *Tenney* v. *Brandhove, supra; Agnew* v. *Moody, supra; Hurlburt* v. *Graham, supra.*

It is equally well settled that the Civil Rights Statutes have no applicability to the acts of federal officials. *Bershad* v. *Wood, supra; Hoffman* v. *Holden, supra; Davis* v. *Forman*, 251 F. 2d 421 (7th Cir. 1958), *cert. denied*, 356 U.S. 974; *Jennings* v. *Nester*, 217 F. 2d 153 (7th Cir. 1955), *cert. denied*, 349 U.S. 958; *Koch* v. *Zuieback*, 194 F. Supp. 651 (D.C.S.D. Calif. 1961), *affirmed*, 316 F. 2d 1 (9th Cir. 1961); *Perkins* v. *Banster*, 190 F. Supp. 98 (D.C. Md. 1960), *affirmed*, 285 F. 2d 426 (4th Cir. 1960); *Toscano* v. *Olsen*, 189 F. Supp. 118 (D.C.S.D. Calif. 1960). Both Senator Eastland and Mr. Sourwine are members of the legislative branch of the federal government, and as federal officers acting within the scope of their authority, are not subject to suit under the Civil Rights Statutes. *Randolph* v. *Willis*, 220 F. Supp. 355 (D.C.S.D. Calif. 1963), *cf. Agnew* v. *Moody, supra.*

Appellants attempt to circumscribe the defense of immunity on two grounds. First, they argue that an allegation charging appellees with conspiring to utilize state law to effect a search and seizure of their records, effectively precludes appellees from asserting that they were acting within the scope of their legislative authority.[27]

That investigations are a proper and well recognized function of the legislative branch of government and inherent in the legislative process is beyond cavil. *Watkins* v. *United States*, 354 U.S. 178 (1957); *Shelton* v. *United States, supra.* The records of SCEF were acquired pursuant to the continuing investigative inquiry of the Senate Internal Security Subcommittee (J.A. 49a). Appellants do not suggest that the records of SCEF were acquired for appellees' personal use. The clear purpose of subpoenaing the records was to enable the Senate Subcommittee to evaluate the records in relation to the explicit responsibility delegated to it by Senate Resolution (J.A. 42a) Appellees submit that even assuming that appellees did participate or conspire in the acquisition of the records by means of the search and seizure, although this is emphatically proved to the contrary, the doctrine of immunity would be an absolute defense.[28] In substance, appellants are charging appellees with using illegal means to perform their legislative responsibility. It is precisely this conduct which the immunity doctrine protects. If a legislative, executive or judicial officer's acts are

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[27] Appellants' rely for this argument upon *Wheedlin* v. *Wheeler, supra,* at 649, n. 2. However, nothing in the body of the opinion of *Wheeler* or the dictum of the cited footnote supports the proposition that appellees are subject to civil liability.

[28] Appellees well recognize that the Supreme Court has acknowledged the existence of "extraordinary" situations where an official removes himself from the protection of the immunity doctrine. *Tenney* v. *Brandhove, supra,* at 377; *Kilbourn* v. *Thompson, supra.* Certainly the alleged acts of appellees do not constitute the extraordinary action discussed in *Kilburn* v. *Thompson, supra,* and referred to in *Tenney* v. *Brandhove, supra.* The outer limits of the doctrine might be reached, said Mr. Justice Miller in *Kilbourn,* "If we could suppose the members of these bodies so far forgot their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment * * *. 103 U.S. 168, 204–205.

done "in relation" to the matters committed by law to his control or supervision, *Cooper* v. *O'Connor, supra,* the officer is not civilly liable. As Judge Hand emphasized in *Gregoire* v. *Biddle, supra,* the doctrine applies to all officials, the innocent and the guilty. To limit the doctrine, as appellants suggest, to proper conduct, would effectively abrogate the privilege.

Appellants also contend that the defense of immunity is made inapplicable in the case at bar by the Supreme Court's decision in *Monroe* v. *Pape,* 365 U.S. 167 (1961). We do not agree. *Monroe* v. *Pape, supra,* does not limit appellees' defense of legislative immunity. Indeed the case had nothing to do with the doctrine of immunity. Initially we note that the Supreme Court made it entirely clear that the civil rights act is only applicable to state, not federal, authorities. *Monroe* v. *Pape, supra* at 180. Appellants seek to avoid this holding by alleging that because the complaint charges that appellees "utilized Louisiana State law", their acts constituted state rather than federal action. Even if this argument were sound nothing in *Monroe* dilutes in any fashion or for any purpose the immunity privilege. If the Supreme Court intended to modify or limit the doctrine, at the very least the Court would have cited the *Tenney* case or discussed the issues involved. Appellees are unable to find any language in *Monroe* v. *Pape, supra,* that supports appellants' argument that the Supreme Court, *sub silentio* or otherwise, intended to change or limit the decision of *Tenney* v. *Brandhove, supra,* a case that directly involved the immunity doctrine as applied to acts done under color of state law.

Appellees' conclusion that the immunity doctrine remains inviolate finds judicial support in *Rhodes* v. *Houston,* 202 F. Supp. 624 (D.C. Neb. 1962), *affirmed,* 309 F. 2d 959 (8th Cir. 1962), *cert. denied,* 372 U.S. 909, where the court stated:

> The recent opinion of the United States Supreme Court in *Monroe* v. *Pape,* * * * does not, as plaintiff suggests, overturn or modify the doctrine of judicial immunity in a federal civil rights action. An examination of of all federal cases which which have cited *Monroe* v. *Pape,* reveals that it has not yet been considered for its effect, if any, upon the well established rule of judicial

> immunity. This court, therefore, relies upon its own reading of that case, and concludes that it has no effect upon the doctrine and is not here in point. *Id.* at 360.

We submit that this statement is equally applicable to the principle of legislative immunity.

We also note that none of the cases cited by appellants [29] to support their contention that the complaint filed herein states a claim for damages under the Civil Rights Act, holds that appellees as federal officers and members of the legislative branch of the government may be required to respond in money damages for an alleged violation of someone's civil rights; or that the legislative immunity doctrine is other that the Supreme Court has recently declared in *Barr* v. *Matteo, supra,* and more specifically insofar as the case at bar is concerned, in *Tenney* v. *Brandhove, supra.*

III. The District Court did not err in denying appellants' request for temporary injunctive relief and in dismissing so much of the complaint as sought permanent mandatory injunctive relief

Appellants in their complaint requested permanent and temporary injunctive relief to restrain appellees from using in any manner the SCEF records or copies thereof. On October 31, 1963, appellants' *ex parte* application for a temporary restraining order was denied by the District Court. On October 31, 1963, appellants also filed a motion for preliminary injunction (J.A. 38a). Attached to this motion was the affidavit of appellant Dombrowski (J.A. 18a) and the affidavit of Benjamin E. Smith, an officer of SCEF (J.A. 19a). Attached to appellees' opposition to the motion for preliminary injunctive relief were affidavits of Senator Eastland (J.A. 39a) and Mr. Sourwine (J.A. 41a). Upon consideration of the allegations in the complaint for equitable relief, the affidavits filed in support of the motion and in opposition thereto, the District Court, on December 18, 1963, denied appellants' request for a preliminary injunction and dismissed that part of the complaint (J.A. 9a–10a) which sought permanent, mandatory in-

[29] *Nesmith* v. *Alford*, 318 F. 2d 110 (5th Cir. 1963); *Lee* v. *Hodges*, 321 F. 2d 480 (4th Cir. 1963); *Jordan* v. *Hutcheson*, 323 F. 2d 597 (4th Cir. 1963)

junctive relief (J.A. 12a). From this order, appellants perfected appeal No. 18,435.

The procedure adopted by the District Court in dismissing that part of the complaint that sought permanent mandatory injunctive relief before appellees had answered, was not only proper but has found specific approval by the Supreme Court in *Mast Foos & Co.* v. *Stover Manufacturing Co.*, 177 U.S. 485 (1900). The Court there held that if the pleading, including affidavits, do not show the existence of a claim for equitable relief, and the movant has no further proof on the subject, then the court should not only deny the motion for an injunction, but dismiss the complaint. 177 U.S. 485, 495. See also, *Randolph* v. *Willis, supra.*

Here the complaint and affidavits on file conclusively demonstrated that appellants were not and could not be entitled to equitable relief. The record clearly disclosed that the files and records of SCEF which were seized by the Louisiana Police on October 4, 1963, were subsequently subpoenaed by the Senate Internal Security Subcommittee from the Louisiana Joint Committee and transferred to the offices of the Senate Subcommittee in the District of Columbia. The record also disclosed on the date of the hearing, December 18, 1963, and appellants do not dispute this fact, that on Novemeber 14, 1963, the Senate Internal Security Subcommittee, by Resolution, incorporated the records of SCEF into its hearing record (J.A. 40a). Additionally, the affidavits of Senator Eastland and Mr. Sourwine, attached to appellees' opposition to appellants' motion for preliminary injunctive relief, showed that Senator Eastland and Mr. Sourwine did not at that time or at any other time have personal possession of the SCEF records (J.A. 39a, 47a). The only suggestion to the contrary is the allegation in the complaint made upon information and belief that the SCEF records were then in the possession of Senator Eastland and Mr. Sourwine (J.A. 7a).

Confronted with this record, we submit that the trial court properly denied appellants' request for preliminary and permamanent injunctive relief.

a. The District Court did not have jurisdiction to issue a preliminary or permanent injunction

It is now axiomatic that among the heaviest responsibilities imposed upon each of the three coordinate branches of the federal government is that which requires each branch to exercise scrupulous self-restraint from taking action which would usurp the powers of the other. *O'Donoghue* v. *United States,* 289 U.S. 516, 530 (1933); *Kilbourn* v. *Thompson, supra.* Notwithstanding appellants' claims to the contrary, they are requesting the judicial branch of the government to restrain the legislative branch from performing its ordinary and proper duties. It is established in our jurisprudence that the courts will not impose any restraint upon the Congress in the conduct of its legislative business. *McGrain* v. *Dougherty,* 273 U.S. 135 (1927); *Hearst* v. *Black,* 66 App. D.C. 313, 87 F. 2d 68 (1936); *Methodist Federation for Social Action* v. *Eastland,* 141 F. Supp. 729 (D.C.D.C. 1956); *Fischer* v. *McCarthy,* 117 F. Supp. 643 (D.C.S.D.N.Y. 1954), *aff'd,* 218 F. 2d 164 (2d Cir. 1954).

In *Fischer* v. *McCarthy, supra,* where the relief sought was to enjoin the Chairman of the Permanent Subcommittee on Investigation of the Senate from forcing plaintiffs to produce documents in their possession, Judge Kauffman stated:

> But the legislature cannot be compelled to submit to the prior approval and censorship of the judiciary before it may ask questions or inspect documents through its investigating subcommittees, or even before it enacts legislation, *New Orleans Water Works Co.* v. *City of New Orleans,* 1896, 164 U.S. 471 * * *; *Hearst* v. *Black,* 1936 66 App. D.C. 313, 87 F. 2d 68; *Alpers* v. *City and County of San Francisco,* C.C.N.D. Cal. 1887, 32 F. 503 any more than the judiciary can be compelled by the legislature to submit its rulings or decisions for legislative approval. *Id.* at 650.

See also *Mins* v. *McCarthy,* 93 U.S. App. D.C. 220, 209 F. 2d 307 (1953).

This rule has equal application to efforts to enjoin a Senate committee from making use of records physically in its posses-

sion. For if the records are in the hands of a Senate Committee "this means neither more nor less than that [the records] are in the hands of the Senate, for the committee is a part of the Senate." *Hearst* v. *Black, supra* at 71.

That the SCEF records or copies thereof were in the possession of the Internal Security Subcommittee, on the date that appellants requested injunctive relief, is beyond question (J.A. 40a). In fact the records had been in the possession of the Subcommittee since October 5, 1963, the date they were subpoenaed from the Louisiana Joint Committee. Nor is there any question that the Subcommittee, which had physical possession of the subpoenaed SCEF records, was a regular and properly constituted Subcommittee of the United States Senate (J.A. 42a).

In short, appellants sought either directly or indirectly to enjoin the Senate Subcommittee from using the records in its possession. This Court refused to grant a similar request in *Hearst* v. *Black, supra.* There, the Federal Communications Commission, through its agents, had seized private telegraphic messages relating to the operation of Hearst's business, which were thereupon examined and copied. The copies and the notes made relating to the telegrams were turned over to the Special Senate Committee. Plaintiff sought to enjoin the Committee from making use of the copies and the notes. This Court held:

> Here, as appears both from the bill and by admission of parties, the committee has obtained copies of the telegrams and they are now physically in its possession; * * * The prayer of the bill is that the committee be restrained from keeping the messages or making any use of them or disclosing their contents. In other words, that if we find that the method adopted to obtain the telegrams was an invasion of appellant's legal rights, we should say to the committee and to the Senate that the contents could not be disclosed or used in the exercise by the Senate of its legitimate functions. We know of no case in which it has been held that a court of equity has authority to do any of these things. On the contrary, the universal rule, so far as we know it, is that the

> legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference.
>
> The Constitution has lodged the legislative power exclusively in the Congress. If a court could say to the Congress that it could use or could not use information in its possession the independence of the Legislature would be destroyed and the constitutional separation of powers of government invaded. Nothing is better settled than that each of the three great departments of government shall be independent and not subject to be controlled directly or indirectly by either of the others. 66 App. D.C. 313, 31.

More recently, this Court, speaking through Judge Bazelon, has specifically held that "a court cannot enjoin a congressional committee from making an unconstitutional search and seizure", although it does have the power to deny legal effect thereto. *Nelson* v. *United States,* 93 U.S. App. D.C. 14, 22, 208 F. 2d 505, 513 (1953), *cert. denied,* 346 U.S. 827. Thus appellants demand for injunctive relief is not strengthened by the charge that their records were obtained by an unlawful search and seizure. See also *Barsky* v. *United States,* 83 U.S. App. D.C. 127, 167 F. 2d 241 (1949), *cert. denied,* 334 U.S. 843.

b. Since appellees never had personal possession of appellants' records they could not be enjoined from using the records

Appellants maintain that their claim for equitable relief is predicated upon the allegation in the complaint made upon information and belief that the records were then in the possession of appellees (Appellants Br. 35), and not upon any allegation that the records were in the possession of the Senate Subcommittee. This contention, however, in no way affects the correctness of the lower court's ruling. By a Subcommittee Resolution, dated November 14, 1963 (J.A. 40a), the Senate Subcommittee incorporated the SCEF records into the Subcommittee's hearing record. Thus on November 29, 1963, the date appellants' motion for a preliminary injunction was served upon the appellees, the issue was moot because on that date appellees did not have the SCEF records in their

personal possession, assuming *arguendo* that they ever had personal possession of the records.

Furthermore, the District Court in the exercise of its equity jurisdiction properly denied appellants' prayer for injunctive relief since it was apparent that such relief would be neither effective nor beneficial to appellants. *Virginia Railway Co.* v. *System Federation No. 40, American Federation of Labor*, 300 U.S. 515, 550 (1937). For the reasons set forth above and more fundamentally because the other members of the Senate Subcommittee were not before the court, it is clear that even if the District Court had undertaken to enjoin appellees from using the subpoenaed records, the Court had no jurisdiction to enjoin use of the records by the remaining members of the Subcommittee.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID C. ACHESON,
United States Attorney.
FRANK Q. NEBEKER,
JOSEPH M. HANNON,
ALAN KAY,
Assistant United States Attorneys.

Of Counsel,
ROGER ROBB.

APPENDIX

APPENDIX "A"

1963

October 31____ Complaint filed.
October 31____ Motion of plaintiff for preliminary injunction filed. Affidavits (2).
October 31____ Motion for temporary restraining Order denied.
November 27__ Summons and copies of complaint and points and authorities in support of motion for preliminary injunction to United States Attorney and Attorney General. D.A. served 11/29/63.
December 6___ Opposition of Defendants Eastland and Sourwine to Motion for Preliminary injunction: Affdavits (2) Exhibit "a".
December 14__ Notice by plaintiffs to take deposition of Defendant Sourwine.
December 16__ Proposed withdrawal of Motion for Preliminary Injunction.
December 18__ Order denying plaintiff's Motion for Preliminary Injunction; dismissing so much of complaint which seeks permanent injunctive relief.
December 26__ Notice of Appeal by plaintiff from Order 12/18/63.

1964

January 9____ Deposition of Julian G. Sourwine filed.
January 28 ___ Motion of Defendants Eastland and Sourwine to Dismiss or for Summary Judgment Exhibit (7); Statement; Points and Authorities.
February 10__ Points and Authorities of Plaintiffs in opposition to motion of defendants Eastland and Sourwine to Dismiss or in the Alternative for a Summary Judgment; Affidavits (2).
March 5_____ Affidavit of Arthur Kinoy; exhibit.
March 10____ Reply of Defendants Eastland and Sourwine to plaintiffs' answer to defendants' motion to dismiss or in the alternative for summary judgment.
March 26____ Order granting summary judgment for defendants Eastland and Sourwine.
April 3_____ Notice of Appeal by plaintiffs from Order 3/26/64.

APPENDIX "B"

Minute Entry, April 20, 1964. Ainsworth, J.

No. 13967, Civil Action, Division D

JAMES A. DOMBROWSKI, ET AL.

versus

COLONEL THOMAS D. BURBANK, ET AL.

This matter came on for hearing on a former day on motions of defendants, Thomas D. Burbank and Russell R. Willie, to dismiss. The court, having heard the argument of counsel and having considered the briefs and affidavits in support thereof, is now ready to rule.

IT IS ORDERED that motion of Thomas D. Burbank be, and the same is hereby, *granted*.

IT IS FURTHER ORDERED that motion of Russell R. Willie be, and the same is hereby, *denied*.

REASONS

An examination of the affidavits filed herein by mover and respondents indicates that there is a sharp dispute between the parties and a genuine issue as to material facts in connection with the activities of the defendant, Major Willie. Trial on the merits is therefore necessary to resolve this dispute and a case is not ripe for summary judgment where a dispute of this kind exists. The affidavits make this especially true with regard to the manner and method of the execution by this defendant of the search warrants and warrants of arrest. Rule 56, Fed. R. Civ. P. See *National Screen Service Corp.* v. *Poster Exchange, Inc.*, 5 Cir., 1962, 305 F. 2d 647.

But the same is not true as to the defendant, Burbank, who, though Superintendent of State Police and therefore the highest officer in that department, nevertheless had no contact with the investigation of the activities of Southern Conference Educational Fund, Inc., and according to his affidavit, was not aware of any contemplated action against the Fund until informed by Mr. Rogers, counsel for the Legislative Committee. The Superintendent then required that Mr. Rogers advise Governor Davis of the proposed operations by the State Police and insisted that Mayor Schiro of New Orleans be informed of the contemplated action and his concurrence had. Beyond instructing Major Willie to cooperate with the Joint Legislative Committee's legal counsel and staff, Superintendent Burbank had no further connection with the complained of activities of the police. According to his affidavit, he was not informed of the contents of the applications for search warrants and in no way participated personally in the activities and did not know that they had been issued until the day after their issuance; he took no part personally in any of the activities in connection with the execution of the warrants. It is true that under the direction of Mr. J. G. Sourwine, counsel for the United States Senate Subcommittee, he caused the material seized by the police to be transported to the Chancery Clerk of Woodville, Mississippi. However, this action is not an issue in this suit, and according to the Burbank affidavit, it was done at the direction of Senator Eastland's committee. The affidavit is in no way controverted by plaintiff and stands undisputed except that plaintiff's counsel in his brief maintains that it is "unthinkable that the conduct of the raids was not with the approval of Colonel Burbank." However, the Burbank affidavit is undisputed and we can see no justification for requiring him to continue as a defendant with the facts showing that he had nothing to do with nor was he aware of the alleged tortious acts.

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